FILED
FEB 26 1927
WM. R. STANSBURY
CLERK

Supreme Court of the United States

OCTOBER TERM, 1926

No. 228.

THE RAILROAD AND WAREHOUSE COMMISSION OF THE STATE OF MINNESOTA, O. P. B. JACOBSON, ET AL., AND CITY OF DULUTH,

Appellants,

vs.

THE DULUTH STREET RAILWAY COMPANY,

Appellee

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF MINNESOTA

31493

BRIEF FOR APPELLEE.

OSCAR MITCHELL
W. D. BAILEY
H. A. CARMICHAEL
Solicitors for Appellee,
1200 Alworth Building,
Duluth, Minnesota.

Huntley-Burnett Printing Co., Duluth, Minn.

SUBJECT INDEX

	PAGE
STATEMENT	1
SUMMARY OF ARGUMENT	6
ARGUMENT	16
I. The Court was not without Jurisdiction because Confiscation under the Order had not Actually Begun but was only Threatened	16
II. No Contract exists which Deprives the Company of the right to resort to the Federal Court to Prevent Confiscation of the Company's Property	24
III. The Action was not Premature	47
IV. Valuation	69
V. Operating Expenses	80
VI. Rate of Return	90
VII. Income Required and Estimated Revenue	94
VIII. Conclusion	96
IX. Supplemental Statement and Brief	97

CASES AND STATUTES CITED

Abilene & S. R. Co. v. United States, 288 Fed. 102	56
A. T. & Santa Fe Ry. Co. v. Love et al., 174 Fed. 59, 185 Fed. 321	56
Bacon v. Rutland Railroad Co., 232 U. S. 134	9, 53
Banton v. Belt Line Railway Corp., 268 U. S. 413	61
Barron v. Burnside, 121 U. S. 186	33
Barth v. Hughes & D. Elec. Co., P. U. R. 1922A, 740	93
Ben Avon Borough v. Ohio Valley Water Co., 271 Pa. 346	11, 69
Bluefield case, 262 U. S. 679	91
Borough of Wyoming v. Luzerne County Gas and Elec. Co., P. U. R. 1922A, 59	72
C. M. & St. P. Ry. Co. v. Minnesota, 134 U. S. 418	50
Chicago Ry. Co. v. Ill. Commerce Com., 277 Fed. 970	56

PAGE

City of Duluth v. Railroad & Warehouse Commission, 209 N. W. 10 ..... 7, 9, 28, 48
City Ry. Co. v. Citizens Street Railroad Co., 166 U. S. 557 20
Re: City of Flint (Mich.) P. U. R. 1922A, 385 93
City of Louisville v. Louisville Home Telephone Co., 279 Fed. 949 67
City of Winona v. Wis.-Minn. Light & P. Co., 276 Fed. 996 70
Columbus Railroad & Power Co. v. Columbus, 249 U. S. 399 ..... 21, 45
Detroit & Mackinac Ry. Co. v. Michigan Railroad Commission, 235 U. S. 402 ..... 9, 54
Detroit, etc. v. Mich. Ry. Com., 203 Fed. 864 57
Donald v. Phil. & R. Coal & Iron Co., 241 U. S. 328 39
Doyle v. Insurance Co., 94 U. S. 535 ..... 8, 32
Duluth Street Ry. Co. v. Rd. & Whse. Com., 4 Fed (2d) 543 78
Re: Eaton Rapids (Mich.) P. U. R. 1922B, 605 93
Re: Duluth Street Railway Co., 1927A, 41 97
Farncomb v. Denver, 252 U. S. 7 53
Re: Franklin Light & Power Co. (N. H.) P. U. R. 1922A, 506 93
Galveston Elec. Co. v. Galveston, 258 U. S. 388 70
Georgia Ry. & Power Co. v. Town of Decatur, 262 U. S. 432 44
Georgia Ry. & Power Co. v. R. R .Com., 262 U. S. 625 80
General Laws Minn. 1921, Ch. 278 ..... 2, 24, 62
General Statutes Minn. 1913, Secs. 4191-4200 62
Gorham Mfg. Co. v. State Tax Com., 266 U. S. 265 58
Green Bay v. Wisconsin Public Service Com., P. U. R. 1922B, 671 94
Hall v. Geiger, 242 U. S. 583 44
Harrison v. St. Louis & Santa Fe Ry. Co., 233 U. S. 18 8
Harrison v. St. Louis & San Francisco Railroad Co., 232 U. S. 318 38
Henderson Water Co. v. Com., 269 U. S. 278 17
Home Insurance Co. v. Morse, 20 Wall. 455 ..... 8, 31
Home Insurance Co. v. Morse, 87 U. S. 445 31
John v. Paullin, etc., 232 U. S. 583 45
Keokuk & Hamilton Bridge Co. v. Salm, 258 U. S. 122 58
Knoxville v. Water Co., 212 U. S. 1 ..... 10, 66, 68
LaCrosse v. Wisconsin-Minnesota Light & Power Co., P. U. R. 1922B, 113 94
Re: Lansing Fuel & Gas Co., P. U. R. 1922B, 605 93

PAGE

Libby v. Libby Water & Elec. Co. (Mont.) P. U. R. 1922E, 402 93
Re: Los Angeles Gas & Elec. Corp. (Cal.) P. U. R. 1922A, 283 93
Re: Lynchburg Traction & Light Co. (Va.) P. U. R. 1922B, 737 93
McCardle v. Indianapolis Water Co., ... U. S. ....., 71 L. ed. 154 ..... 74, 77, 92
Mitchell v. Dakota Central Tel Co., 246 U. S. 394 21
Monroe Gas, Light & Fuel Co. v. Mich. P. U. Com., 292 Fed. 139 57
Mutual Reserve Fund v. Cleveland, etc., 82 Fed. 508 42
Nashua River Paper Co. v. Hammermill Paper Co., 223 Mass. 8 40
Northwestern Bell Tel. Co. v. Hilton, 274 Fed. 384, 4 Fed. 2d, 545 ..... 9, 51
North America Cold Storage Co. v. Chicago, 211 U. S. 306 19
Nute v. Insurance Co., 6 Gray, 174 32
Re: Oconto Service Co., P. U. R. 1922E, 130 93
Oklahoma Natural Gas Co. v. Russell, 261 U. S. 290 ..... 9, 59
Opelika v. Opelika Sewer Co., 265 U. S. 215 46
Pacific Tel. & Tel. Co. v. Kuykendall, 265 U. S. 196 ..... 9, 60
Re: Page Lighting Plant (N. D.) P. U. R. 1922A, 652 93
Pennsylvania v. West Virginia, 262 U. S. 553 ..... 6, 23
Re: Plymouth Elec. Light Co. (N. H.) P. U. R. 1922B, 467 93
Re: Power & Light Co., P. U. R. 1922 A, 436 73
Prendergast v. Tel. Co., 262 U. S. 43 ..... 9, 11, 23, 54, 68
Prentis v. Atlantic Coast Line Co., 211 U. S. 210 17
Prince Steam-Shipping Co. v. Lehman, 39 Fed. 704 41
Public Service Com. v. St. Cloud, 265 U. S. 352 43
Raymond v. Chicago, etc., 207 U. S. 20 19
Re: Rio Elec. Co. (Wis.) P. U. R. 1922E, 764 93
Re: Rose Milling Co., P. U. R. 1922A, 587 93
Re: San Joaquin Light & Power Co. (Cal.) P. U. R. 1922D, 595 93
Security Mutual Life Ins. Co. v. Prewitt, 202 U. S. 246 ..... 35, 37
Slocum v. Western Ins. Co., 42 Fed. 235 42
Smith v. Ill. Bell Tel. Co., 270 U. S. ....., 70 L. ed. 440 61
Southern Pacific Co. v. Denton, 146 U. S. 202 34
So. Covington v. Newport, 259 U. S. 97 19

PAGE

Special Laws Minn. 1881, Ch. 200 24
Springfield Gas & Elec. Co. v. Barker, 231 Fed. 331 60
Stamford v. Stamford Gas & Elec. Co., P. U. R. 1922A, 303 93
State v. Holm, 138 Minn. 281 25
State v. Great Northern Ry. Co., 130 Minn. 57 ..... 52, 59
Steenerson v. G. N. Ry. Co., 69 Minn. 353 ..... 49, 59
Terral v. Burke Construction Co., 257 U. S. 529 ..... 8, 31, 40
The Etona, 64 Fed. 880 42
Re: Tuscon Gas, Elec. Light & Power Co. (Ariz.) P. U. R. 1922C, 658 93
United States v. Abilene & S. Ry. Co., 265 U. S. 274 57
Utah Light & Traction Co., 1920B, 262 72
Re: Utica Gas & Elec. Co., (N. Y.) P. U. R. 1922A, 147 93
Vicksburg Water Works v. Vicksburg, 185 U. S. 65 ..... 6, 18
Waite v. Macy, 246 U. S. 606 22
**Waukesha Gas & Elec. Co. v. Railroad Commission 73
Re: Webb City & Carterville Gas Co. (Mo.) P. U. R. 1922C, 608 93
Wilcox v. Consolidated Gas Co., 212 U. S. 19 ..... 10, 23, 67
Winona v. Wisconsin Minnesota Light & P. Co., 276 Fed. 996 94
Re: Wisconsin Gas & Elec. Co. (Wis.) P. U. R. 1922C, 829 94
Re: Wisconsin Minnesota Light & Power Co., P. U. R. 1922D, 131 94

**(Decided in January, 1927, not yet officially reported.)

APPENDIX

Complainant's Exhibit 32 ..... Attached to Page 97
Commission's Order of October 4, 1926 100

Supreme Court of the United States

OCTOBER TERM, 1926

No. 228.

THE RAILROAD AND WAREHOUSE COMMISSION OF THE STATE OF MINNESOTA, O. P. B. JACOBSON, ET AL., AND CITY OF DULUTH,

Appellants,

vs.

THE DULUTH STREET RAILWAY COMPANY,

Appellee

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF MINNESOTA

31493

BRIEF FOR APPELLEE.

STATEMENT

In this brief the appellee will sometimes be called the Company, the appellants other than the City of Duluth the Commission and appellant City of Duluth the City.

A brief statement seems advisable.

In 1921 a number of companies were operating street railways in Minnesota under franchises having definite terms of existence, specifying maximum rates of fare and containing service regulations. In that year the legislature passed Chapter 278, Laws of 1921, which provided for a system of permits revocable at will by the legislature, the regulation of rates of fare by the Railroad and Warehouse Commission of the state and the regulation of service by the municipalities in which lines were operated.

Inasmuch as companies operating under franchises contractual in their nature could not be required to surrender these franchises and accept indeterminate permits revocable at the will of the legislature, nor to surrender the contract right to charge the maximum rate of fare therein specified, nor to submit to regulation by the municipalities contrary to that provided in such franchises, the law then enacted specifically provided in Section 2 thereof that any company desiring that the grant of its franchise should become an indeterminate permit and its operation become subject to the law might file with certain specified officers "a written declaration that it desires that such grant shall become an indeterminate permit and consent that the terms of this act shall apply to and govern the ownership, control, management, maintenance and operation of the street railway property of said street railway," and that upon the filing of such declaration and consent "such grant, subject to the provisions of this act shall become an indeterminate permit," etc.

The Company filed the necessary declaration and consent and thereafter, pursuant to the provisions of the act, upon the application of the Company dated May 13, 1921, the Railroad and Warehouse Commission, under date of July 13, 1922, made its order finding the value of appellee's property, what was a fair rate of return thereon and fixing a rate of fare to be charged of six cents cash, five rides for twenty-five cents.

The Company thereupon brought this action in the federal district court to enjoin the enforcement of said rate order as confiscatory. The statutory court of three judges directed the issuance of an interlocutory injunction on condition that the Company should charge not to exceed six cents cash and should sell tickets in blocks of five for thirty cents, with coupons for five cents redeemable by the Company upon conditions thereon stated.

The Commission and the City appealed to this court from the order granting the interlocutory injunction and later, without a hearing, that appeal was dismissed.

A Master was appointed, who heard the evidence and made his report. Upon final hearing the trial court upheld the report of the Master except as to value of the property, increased the value somewhat and entered final decree enjoining the enforcement of the Commission rate on condition that the Company charge not more than six cents for each passenger. The matter is here on appeal from that decree.

The Commission in its order found the value of the Company's property as of July 1, 1921, $4,593,000; additions July 1 to Dec. 31, 1921, $6,978.22, and total as of December 31, 1921 to be $4,599,978.22.

The Master found the same total value, although he made some changes in the value of specific items. The trial court found the value as of Dec. 31, 1921 $5,009,510.00.

On the hearing before the Commission and before the Master the inventory of the physical property of the Company was agreed upon and the unit prices of the physical property other than land were agreed upon on four different bases:

Basis No. 1; Pre-war prices prevailing in 1915.

Basis No. 2; Average prices ten years ending July 1, 1921.

Basis No. 3 Prices prevailing July 1, 1921.

Basis No. 4; Prices representing the actual investment of the company.

Prices under Basis No. 1 (pre-war) and Basis No. 4 (investment) were practically the same.

Prices under Basis No. 2 (1912-1921) were approximately 40% higher than under Nos. 1 and 4.

Prices under Basis No. 3 were practically 80% higher than under Nos. 1 and 4.

Upon the agreed inventory and unit prices the reproduction cost undepreciated of the physical property, except land, of the Company as of July 1, 1921, was:

Basis No.1 1915 Prices	Basis No. 2 10 year average	Basis No. 3 July 1, 1921 prices	Basis No.4 Investment
$3,488,161	$4,864,437	$6,308,966	$3,487,020

(Record p. 20)

In its order the Commission used the pre-war or investment basis for the physical property other than land and to give effect to increased prices then prevailing added 12.99+%. The Master used the same basis and on the same items and for the same purpose added 21.43+% and the court, using the same basis and excluding certain portions of the property which had been acquired during the period of high prices, added for the same purpose 40%.

The Company's evidence, which was not disputed, was that the prices prevailing at the time of the hearing before the Commission and before the Master were more than 50%

higher than the pre-war or investment basis prices. (Record p. 251).

The Commission in its order found an accrued depreciation upon the depreciable property of the company of 17% and this figure was accepted by the Master and the trial court.

The Commission found in its order that the reasonable annual rate of return upon the fair value of the property was 7½%. This rate of return was adopted by the Master and trial court.

The Commission and the City have both appealed. In their statement of points to be relied upon the Commission states but two:

1. That the Company had agreed that all matters in controversy in this action should be determined finally and conclusively and exclusively by the Railroad and Warehouse Commission and the state courts of Minnesota under and pursuant to the provisions of Chapter 278, Laws of Minnesota for 1921; and

2. That the action was premature for the reason that the Company had not taken the appeal to the state courts, provided for in the law.

The City, in its statement of points, copies the two points relied upon by the Commission and adds that the action was premature because no test of the Commission rate had been made and specifies other points as to value, expense of operation, rate of return and net revenue that would have been received under the Commission's rate.

In the brief the Commission and Attorney General raise a new question, that the court was without jurisdiction on the ground that confiscation under the Commission's order had not actually begun when the action was started.

SUMMARY OF ARGUMENT.

I.

The Court was not without jurisdiction because confiscation under the order had not actually begun but was only threatened.

The Commission had made its order which the Company alleged would confiscate its property if carried out, and the complaint alleged the Commission threatened to enforce the order.

> "One does not have to await the confirmation of threatened injuries to obtain preventive relief. If the injury is certainly impending, that is enough." *Pennsylvania v. West Virginia*, 262 U. S. 553.
>
> "It is one of the most valuable features of equity jurisdiction to anticipate and prevent a threatened injury where the damages would be insufficient or irreparable." *Vicksburg Waterworks Company v. Vicksburg* 185 U. S. 65.

II.

No contract exists which deprives the Company of the right to resort to the Federal Court to prevent confiscation of the Company's property.

(a) *Consent of the Company to be governed by the act did not create a contract of any kind.*

The Company was operating under a franchise, contractual in its nature, with a definite term and fixing maximum rates of fare. It could not, without its consent, be compelled to surrender its franchise and accept an indeterminate permit and give up its right to charge maximum fares fixed in its

franchise, and consent that its fares might be fixed by the agency of the Legislature. The "consent" of the Company to be brought under the operation of the law was therefore necessary.

The franchise under which the Company was operating expressly provided that upon its acceptance it should become a contract. The law, under which it consented to be governed, negatives the idea of contract by providing that it may be repealed, modified or amended at any time, or all rights of the Company thereunder taken away without compensation.

(b) *If consent of the Company to be governed by the act be construed as contractual, still it cannot be construed as an agreement to waive any right to resort to the Federal Court.*

The act gives to the Commission "initial and exclusive power and authority * * * to fix and establish rates or fare * * * subject to the powers of the District Court in case of appeal thereto, as hereinafter provided."

The State Supreme Court in *City of Duluth v. Railroad & Warehouse Commission*, 209 N. W. 10, held that the proceedings before the District Court on appeal were judicial in their nature, saying: "We see nothing in Section 10 imposing legislative or administrative duties upon the court." The "powers of the district court" to which the "power and authority" of the Commission is subject, are judicial powers, and when the proceeding has reached the stage where judicial powers of the state court may be exercised the like powers of the Federal Court may also be exercised. No attempt was made in the law to prohibit the resort to the Federal Court.

(c) *If consent of the Company to be governed by the act be construed as creating a contract binding the Company not to resort to the Federal Court, such contract would be void.*

This question is settled beyond possibility of controversy by a line of decisions in this Court, beginning with *Home Insurance Company v. Morse*, 20 Wall. 455, and ending in 1922 with *Terral v. Burke Construction Company*, 257 U. S. 529.

In *Doyle v. Insurance Co.*, 94 *U. S.* 535, it was said:

> "Every man is entitled to resort to all the courts of the country to invoke the protection which all the laws and all the courts may afford him and he cannot barter away his freedom or his constitutional rights."

In *Harrison v. St. Louis & Santa Fe Ry. Co.*, 233 U. S. 18, the court said:

> "It may not be doubted that the judicial power of the United States as afforded by the constitution and provided for by Congress pursuant to its constitutional authority, is a power wholly independent of state action, which therefore the several states cannot by any exercise of any authority of any form, directly or indirectly, destroy, abridge, limit or render inefficacious."

The rule holding such agreements to be void as against public policy has been uniformly adopted by all courts wherever the question has arisen, as shown by the cases cited in the brief.

III.

The Action Was Not Premature.

(a) *No principle of comity or convenience prevented the Company from bringing this action in the Federal Court as soon as the Commission's rate order was made.*

The order of the Commission fixing rates of fare was the

final legislative act, and the judicial stage was then reached. In *City of Duluth v. Railroad & Warehouse Commission*, 209 N. W. 10, the Supreme Court of Minnesota said, referring to the section of the law authorizing appeal to the District Court: "We see nothing in Section 10 imposing legislative or administrative duties upon the Court."

Northwestern Bell Telephone Company v. Hilton, 274 Fed. 384, 4 Fed. 2d, 545.

Bacon v. Rutland Railroad Company, 232 U. S. 134.

Prendergast v. Telephone Co., 262 U. S. 43.

Detroit & Mackinac Railway Company v. Michigan Railroad Commission, 235 U. S. 402.

The action was not premature, even if the duties of the Court on appeal under the provisions of Section 10 be considered as legislative and not judicial. "Rules of comity or convenience must give way to constitutional rights." *Oklahoma Natural Gas Co. v. Russell*, 261 U. S. 290. "Under such circumstances comity yields to constitutional right and the fact that the procedure on appeal in the legislative fixing of rate has not been concluded will not prevent the Federal Court of equity from suspending the daily confiscation if it finds the case to justify it." *Pacific Tel. & Tel. Co. v. Kuykendall*, 265 U. S. 196.

(b) *The action was not premature, because brought before testing the Commission rate.*

No test of the Commission rate was necessary. The Company was operating under a straight five cent fare when the law was passed, and its experience under that rate was a practical test of the Commission rate, six cents cash, five tickets for twenty-five cents, a five cent fare for everyone who cared to invest at any one time as much as twenty-five cents.

The Company established by its affidavits before the statutory court of three Judges and by its evidence before the Master that under such a rate more than 90% of the passengers could be expected to ride at the five cent rate.

In the argument on the issuance of the interlocutory injunction before the three Judges, Judge Sanborn, in delivering the opinion of the three Judges, said:

> "We are satisfied that this corporation has been deprived during the last six months of a part of its property and that the rate which has been prescribed by the Commission of six cents cash and five tickets for twenty-five cents will continue the deprivation until there is a radical change in the business of the Company."

The evidence before the Master showed the experience of the Company for one full year under a straight six cent fare, and the Master found that the Commission rate, if enforced, would be confiscatory. The trial court upheld this finding of the Master, and found that the Commission's order would, if enforced, result in confiscating the Company's property.

The evidence before the statutory court of three Judges, and later before the Master and the trial court, satisfied all of the requirements of the rules of this Court.

In the *Knoxville* case, this Court said that if the company chose to bring its action to enjoin the rate ordinance before testing it, it must be prepared to show to the *"satisfaction of the court"* that the ordinance, if enforced, would result in confiscation, and further, "it cannot be doubted that in a clear case of confiscation, it is the right and duty of the court to annul the law."

In the *Wilcox case*, this Court said that where the rate is so low upon any reasonable basis of valuation that "there

can be no just doubt as to its confiscatory nature," that there should be no hesitation in so deciding, and in "*enjoining its enforcement without waiting for the damage which must inevitably accompany the operation of the business under the objectionable rate.*"

In the *Prendergast* case, 262 U. S. 43, there was no test of the rates which were enjoined, and this Court said: "*There was no necessity in the particular situation presented for any test period of the new rates.*"

IV.

Valuation.

(a) *Cost of financing was properly allowed.*

The actual cost of financing, in the sum of $89,075.00, was established and allowed, under the authority of *Ben Avon Borough v. Ohio Valley Water Co.*, 271 Pa. 346, and other cases cited in the main brief.

(b) *The amount added to reflect present day prices was not too high.*

The Commission took the agreed inventory of the physical property, except land, and applied to it the agreed unit prices prevailing before the war, and added to this amount 12.99+% to give effect to higher prices existing July 1, 1921, agreed to be approximately 80%. From the amount so obtained the Commission deducted accrued depreciation of 17% of the value of the depreciable property so found.

The Court, for the purpose of giving effect to the higher prices prevailing on July 1, 1921, added 40% to the pre-war prices as to all property of the Company shown to have been acquired before prices were affected by the war, and approved the Commission's finding as to the rate per cent of accrued depreciation.

The addition by the Court of only 40% to the reproduction cost, as measured by pre-war prices, of the property acquired by the Company before prices were affected by the war, was too low. By applying to the inventoried property the 1915 or pre-war prices as agreed upon, it was established that average prices for the ten years ending July 1, 1921 were aproximately 40% above the pre-war prices, and that the prices prevailing July 1 ,1921, the date at which the Commission fixed its valuation, were approximately 80% above the 1915 or pre-war prices. This Court held in the *Indianapolis Water Company* case, recently decided, that the average prices prevailing over the ten years ending with 1921 were too low to be used as a basis of reproduction cost for a valuation as of 1922. The evidence in this case shows that prices prevailing on July 1, 1921 were somewhat higher than those prevailing in 1922 and 1923.

V.

Operating Expenses.

(a) *Depreciation.*

While the Court found the value of the depreciable property higher than that found by the Commission, it did not increase the annual depreciation as fixed by the Commission. The Commission is not here criticizing the finding of the Court on that item, and the City's objection is based on the mistaken notion that the Commission applied its percentage rate of depreciation upon the property not subject to depreciation. We have demonstrated this mistake in our main brief.

(b) *The City objects to operating expenses caused by increased service without approval of the City having first been obtained to the increased service.*

The Master properly held that the approval of the City

was not necessary and the evidence conclusively shows that the increased service more than paid for itself, so that there was no increase in operating expenses due to the increased service.

(c) *The City makes some criticism of the allowance of attorneys' fees. This was legitimate expense properly charged to operating expense.*

(d) *The City complains as to certain operating expenses which were incurred and paid in connection with the rate proceeding; they were under the direct authority of the law.*

(e) and (f) *The City complains as to certain items of expense on the ground that they were abnormal. They were actually incurred during the trial year and were allowed by both the Master and the Court.*

VI.

Rate of Return.

The Commission, Master and the Court all agreed upon a rate of return of 7½%. The evidence fully supports this finding and would have supported a finding of 8%. A large number of citations are given where 8% or more was allowed by Commissions and Courts during the year 1922.

VII.

Income required and estimated revenue.

The Commission assumed 27,030,000 passengers would be carried annually. The Commission found that an annual increase of $95,000 in revenue was necessary above what would be produced by a five cent fare and assumed that that

would be produced by the passengers paying cash fare under its rate. If 27,030,000 passengers had ridden in one year, to produce this amount it would have been necessary that more than one-third of them pay the extra one cent. The evidence showed that less than 10% of the passengers could be expected to pay the six cent cash fare under the Commission rate. The trial court found that passenger revenue of $1,551,535.25 was required. At the average rate assumed by the Commission of five and one-third cents per passenger, this would have required more than 29,000,000 passengers, but the actual number of passengers carried during the first year after the Commission's order was 25,384,100, or approximately 2,000,000 fewer than the Commission estimated and approximately 4,000,000 fewer than necessary, even on the Commission's estimate of the number of passengers that would have paid the cash fare. On the basis furnished by the evidence of the percentage of passengers that would pay the cash fare, the deficiency would have been still greater.

VIII.

Conclusion.

The Court had jurisdiction; the action was not premature; the value found by the Court was too low; the rate of return as found by the Commission, Master and Trial Court was not too high; the operating expenses as found by the Master and approved by the Court were supported by the evidence; the rate of fare, six cents cash, and five rides for twenty-five cents, was entirely insufficient, and if put into effect would have confiscated the Company's property.

The decree was right and should be affirmed.

IX.

Supplemental Statement and Brief.

On October 4, 1926, the Commission made its order, effective October 15 ,1926, in which it increased the value of the property to substantially that found by the Court, confirmed its earlier finding as to the 7½% being a reasonable rate of return, and found that owing to the increasing use of the automobile the number of passengers carried by the Company had decreased to such an extent that at the straight six cent fare, the Company would have a deficit for the year 1926 below what it was entitled to receive of $247,526.00.

If there was any doubt remaining in anybody's mind as to the Commission's rate order of six cents cash and five rides for twenty-five cents being confiscatory, that doubt was removed by the later order of the Commission itself finding a higher value for the property, recognizing its error in estimating the number of passengers who would ride, and determining that a rate of fare even higher than that permitted to be charged by the decree of the Court was reasonable and proper.

ARGUMENT.

This appeal involves the validity of the rate order made by the Commission on July 13, 1922, of six cents cash and five rides for twenty-five cents.

There are certain preliminary questions to be discussed before reaching the question of the value of the property, rate of return, results from operation and rate of fare.

The Attorney General and the Commission by their brief raise but two questions (1) that the court was without jurisdiction when the action was begun and (2) that the action was premature.

The first point, of lack of jurisdiction, appears in this brief for the first time in this proceeding. It was nowhere mentioned during the proceedings in the court below and was not mentioned in the statement of points to be relied upon, filed pursuant to Paragraph 9 of Rule 11 of the court. The point is not made by the City either in its designation of points to be relied upon nor in its brief but we assume that, it being the claim of lack of jurisdiction made by the Attorney General of the state, the court will notice it even though it has not been brought before the court in the manner required by the rules.

I.

The Court was not without Jurisdiction Because Confiscation under the Order had not Actually Begun but was only Threatened.

The order of the Commission was made July 13, 1922, effective August 1, 1922. This action was started July 18, 1922. The complaint alleged the making of the order, that if enforced it would subject the Company to great and irreparable

loss, damage, expense and inconvenience, would confiscate its property and deprive it of its property and rights without due process of law and deny to it due protection of the law, in violation of the 14th amendment to the federal constitution and that the defendants, being the Commission and its individual members, and the Attorney General were "threatening to enforce and are about to enforce said order against this complainant in manners and ways unknown to this complainant." (Record p. 9)

The point now made, as we understand it, is that because confiscation had not actually begun the court is without jurisdiction to enjoin it. This point certainly has the distinction of being novel. We do not recall ever having seen it made before. If sound, then this court has acted without jurisdiction in many cases where it has considered the matter of an injunction as a preventive remedy.

In many of the cases relied upon by the City as showing the necessity for test of the Commission's rate the action was brought to test the validity of the rate before it was put in force and therefore before actual confiscation thereunder had begun. In most cases where an injunction is asked for, it is not to stop injury then being done but to prevent irreparable injury then threatened. The writ of injunction came into existence to prevent injury where no adequate remedy could be given at law and in all cases where an injunction is asked for to prevent the doing of a single act the remedy would be entirely useless if it could not be sought until the act of injury had begun.

On Pages 16 and 17 of the brief the Attorney General apparently relies upon the case of *Henderson Water Co. v. Commission*, 269 U. S. 278, and says on Page 17 of the brief that this suit was not merely premature and capable of being held in abeyance like the *Prentis* case but like the *Henderson Water Co.* case is so premature that jurisdiction did not exist at all on the day the suit was commenced. We think it would be

somewhat of a surprise to this court to realize that it did not have jurisdiction in the *Henderson Water Company* case. We find nothing in that decision to give countenance to such a view.

In *Vicksburg Water Works v. Vicksburg*, 185 U. S. 65, the court reversed the judgment of the lower court, dismissing the suit for lack of jurisdiction. The company claimed a contract with the city for the continued supply of water. The city threatened to deny liability under this contract and to refuse to pay compensation provided for in that contract. The bill asked for an injunction to restrain the city from assuming to abrogate and take away the franchises and contract rights of the complainant and from attempting to coerce the company to sell its works to the city for an inadequate price. After disposing of certain objections to the bill this court said:

> "It is further contended that the bill does not disclose any actual proceeding on the part of the city to displace complainant's rights under the contract, that mere apprehension that illegal action may be taken by the city cannot be the basis of enjoining such action, and that therefore the circuit court did right in dismissing the bill. We cannot accede to this contention. It is one often made in cases where bills in equity are filed to prevent anticipated and threatened action. But it is one of the most valuable features of equity jurisdiction, to anticipate and prevent a threatened injury, where the damages would be insufficient or irreparable. The exercise of such jurisdiction is for the benefit of both parties; in disclosing to the defendant that he is proceeding without warrant of law, and in protecting the complainant from injuries which, if inflicted, would be wholly destructive of his rights."

In the case at bar the complaint alleged the making of the order by the Commission, that if enforced it would confiscate plaintiff's property and that the defendants were threatening

to enforce it. Every element present in the *Vicksburg* case is present in the case at bar and the *Vicksburg* case is an authority on all fours for the claim of jurisdiction in this suit.

In *Raymond v. Chicago, etc.*, 207 U. S. 20, action was brought to enjoin proceedings for the collection of taxes upon the ground that the assessment was made in violation of the 14th amendment and if enforced would result in taking appellee's property without due process of law. In granting the injunction in the decree appealed from the court pointed out that the assessment had been made on a basis which if enforced would deny the complainants the equal protection of the law and said:

> "We have no doubt that complainants may entrench themselves against this invasion by a writ of injunction. One of the primary grounds of equity jurisdiction is to reach cases involving mistake, fraud or coercion, and the relief necessary to their correction. The cases under consideration come clearly within this jurisdiction. It is incomprehensible that the complainants may not avert this threatened invasion of their rights—that they must first yield and then turn prosecutors in a court of law to recover their loss. The fundamental guarantees of the constitution must not be thus emasculated."

And this judgment was affirmed by this court.

In *North America Cold Storage Co. v. Chicago*, 211 U. S. 306, jurisdiction was founded on the allegation that the ordinance in question violated the 14th amendment because it provided for no notice to the complainant before seizure and destruction of food. No seizure had been made but was only threatened.

In *So. Covington v. Newport*, 259 U. S. 97, the action was brought in the Federal Court of Kentucky to enjoin the enforcement of a municipal resolution directing the removal of

a high tension wire constructed by a street railway, light and power company. The bill alleged the adoption of the resolution by the Board of Commissioners of the defendant city, declaring the electric wire dangerous to life and property and directing the removal of the wires not later than a certain date and alleged that unless restrained by the court defendant would remove the wire, causing plaintiff irreparable injury. The trial court dismissed the bill for lack of jurisdiction. Its action was reversed by this court, saying:

> "Where, as here, the jurisdiction of a district court has been invoked on the sole ground that the cause involves a federal question, and this is duly challenged, the issue must be determined by considering the allegations of the bill. If they distinctly disclose a real, substantial question of that nature, there is jurisdiction; otherwise there is none. * * *
>
> "Here it is affirmatively alleged that the city intends forcibly to remove and destroy appellants' property and thereby violate their constitutional rights. This presented a substantial claim under the constitution."

In *City Railway Co. v. Citizens Street Railroad Co.*, 166 U. S. 557, the action was brought by the railway company to enjoin the railroad company from interrupting or disturbing complainant in the construction, operation and maintenance of a street car system in the city of Indianapolis. The plaintiff claimed a contract with the city giving it the right to lay and operate street railway lines in the city streets and providing that the city should not confer any privilege upon any one else that would conflict with the plaintiff's rights. The city made a grant which plaintiff claimed if carried out would substantially destroy the rights granted to plaintiff. Both parties were citizens of the same state and the question of jurisdiction was raised. In upholding the jurisdiction this court said:

> "All that is necessary to establish the jurisdiction of the court is to show that the complainant had or claimed in good faith to have a contract with the city which the latter had attempted to impair."

In *Mitchell v. Dakota Central Telephone Co.*, 246 U. S. 394, this court had under consideration an action brought to enjoin the enforcement of a municipal ordinance terminating the right of a telephone company to maintain and operate telephone system and requiring removal of its poles and wires from a city street. The question of jurisdiction was first passed upon and as to this the court said that the proposition needed but little comment and continued:

> "The company attacked the ordinance or resolution of the city requiring the company to remove its poles and wires from the streets as an impairment of the contract constituted by other ordinances, and hence invoked against the city the contract clause of the constitution of the United States, and also, on account of the asserted destruction of its property, urged in its protection the due process clause. The city combated both propositions.
> * * *
> "It will be seen, therefore, that the company invoked rights under the constitution of the United States, and the district court considered them to be substantial, not formal, and accordingly exercised jurisdiction."

The lower court issued the injunction as prayed for. This court, upon the construction which it placed upon the resolution of the city and of the rights of the company under one of the ordinances, reversed the action of the lower court but not on the ground of lack of jurisdiction.

In *Columbus Railroad & Power Co. v. Columbus*, 249 U. S. 399, the court had under consideration an action brought by the railway company to enjoin the city from enforcing rates

of fare contained in a franchise contractual in its nature. The trial court dismissed the bill for want of jurisdiction, saying that the nature of the threats made and the means to which it is expected the city will resort to enforce its threat are not stated or shown. This court held that the lower court was in error on this point, saying:

> "We are of opinion that there was jurisdiction in the district court to entertain the bill as it presented questions arising under the 14th amendment to the federal constitution not so wholly lacking in merit as to afford no basis of jurisdiction . Jurisdiction does not depend upon the decision of the case, and should be entertained if the bill presents questions of a character giving the party the right to invoke the judgment of a federal court."

The court then proceeded to dispose of the case on the merits and decided against the company.

In *Waite v. Macy*, 246 U. S. 606, the court had under consideration an action brought to enjoin the Board of General Appraisers from applying an alleged illegal test to imported tea. The district court had dismissed the bill upon appeal, the circuit court of appeals had reversed the decree of the district court decreeing the injunction prayed for and its action was upheld by this court. In the course of its decision, which was upheld here, the circuit court of appeals said:

> "This is no academic construction of a statute in advance of its application; and we are dealing with a concrete case; the teas have been bought and brought here at large expense in reliance upon the statute; they have been once rejected, and unless the injunction be granted they will inevitably be again rejected, with the result that they must be removed from this country or destroyed. There is no ground for the contention that the application is premature, on the theory that non

constat what is shown the board may finally admit the teas; the record establishes the converse of this proposition. Time will be saved and loss reduced by now enjoining a threatened injury, if the action which is threatened is without authority of the law."

In *Prendergast v. New York Telephone Co.*, 262 U. S. 43, the order of the Commission was made on March 3, 1922, effective April 1, 1922. The action was brought on March 29, 1922, before the order became effective. The injunction was issued on June 12, 1922, and the order of the court issuing the injunction was upheld by this court. No question as to jurisdiction was raised.

In *Wilcox v. Consolidated Gas Co.*, 212 U. S. 19, the Commission's order was effective May 1, 1906, and the court granted an interlocutory injunction. Appeal was taken to this court and question of jurisdiction raised. This court, in upholding the jurisdiction, said of the case:

"It involves the constitutionality with reference to the federal constitution, of two acts of the legislature of New York, and it is one over which the circuit court undoubtedly had jurisdiction under the act of Congress, and its action in taking and hearing the case cannot be the subject of proper criticism."

In *Pennsylvania v. West Virginia*, 262 U. S. 553, the court had under consideration the validity of a statute of West Virginia designed to reserve natural gas produced in that state for the use of its own citizens. The action was an original action in this court brought by the states of Pennsylvania and Ohio. In the course of its opinion the court said:

"The second question is whether the suits were brought prematurely. They were brought a few days af-

> ter the West Virginia act went into force. No order under it had been made by the public service commission, nor had it been tested in actual practice. But this does not prove that the suits were premature. Of course they were not so, if it otherwise appeared that the act certainly would operate as the complainant states apprehended it would. One does not have to await the consummation of threatened injury to obtain preventive relief. If the injury is certainly impending that is enough."

Injunction is a preventive remedy and will be issued to prevent a threatened irreparable injury. It is not necessary to wait until the injury has occurred for then it would be too late. The complaint here alleged the making of the order, that if enforced it would violate plaintiff's constitutional rights to its irreparable injury and that enforcement was threatened. These allegations made in good faith—upheld by the court below—gave jurisdiction.

II.

No Contract Exists Which Deprives the Company of the Right to Resort to the Federal Court to Prevent Confiscation of the Company's Property.

At the time of the passage of Chapter 278, Laws of Minnesota 1921, the company was operating under a franchise contract contained in Chapter 200, Special Laws of Minnesota, 1881. This franchise contained a provision in Section 8 which limited the fare between points within the then Village of Duluth to five cents. Other language in this section indicated that it was not intended that the five cent fare should cover more than a three mile ride, but by later legislation the village became a city and other territory was added so that in 1921 passengers were being carried throughout the city, a distance

in some cases of more than 15 miles, for a single fare of five cents.

Section 16 of said Chapter 200 contained a provision for filing with the Secretary of State and with the Recorder of the Village

> "a written acceptance of the grants hereinabove made with the conditions, regulations and limitations above expressed, signed by the President and Secretary of said company, and when so accepted the same shall operate as a contract between the state and village and said company."

Such acceptance was filed and the franchise thus by its terms became a contract which was binding upon the state, the village and the company.

In *State v. Holm*, 138 Minn. 281, decided in 1917, the court upheld a law passed in 1915 which permitted telephone companies to surrender franchises and receive in lieu thereof indeterminate permits to occupy the streets of the municipalities, holding that the contract rights of the municipalities under such franchises might be surrendered by the legislature.

It is familiar law, requiring no citation of authority, that the contract right of the Company under such franchise could not be impaired or taken away by legislative act without its consent.

The solution, therefore, where the state desired to change the status of the company's rights from franchises with definite limits of time and fixed maximum rates of fare to indeterminate permits subject to legislative control and rates of fare fixed by a commission, was that adopted; a regulatory law giving to the companies the option of continuing under their franchises or of surrendering them and coming under the provisions of the regulatory law.

This plan was followed, Chapter 278 was enacted and the companies desiring to come under the provisions of the law filed the consent required and thereby automatically became subject to its provisions.

The point is now made by both the Commission and the City that by filing its declaration that it desired the grant in its old franchise to become an indeterminate permit and consenting that the terms of the act should apply to and govern the ownership, control, management, maintenance and operation of its property, the company bound itself by contract not to resort to the federal courts to enjoin the enforcement of confiscatory orders of the Commission. To that claim the company answers:

(a) Consent of the Company to be governed by the act did not create a contract of any kind;

(b) If consent of the Company to be governed by the act be construed as contractual, still it cannot be construed as an agreement to waive any right to resort to the Federal Court; and

(c) If consent of the Company to be governed by the act be construed as creating a contract binding the company not to resort to the Federal Court, such contract would be void.

(a)

Consent of the Company to be governed by the act did not create a Contract of any kind.

This consent was only necessary because by reason of the old contract franchise in existence the legislature could not, without such consent, require the Company to come under the provisions of the act, insofar as such provisions are in conflict with the contract provisions of the franchise. There is nothing in the language of the act that indicates any intention

on the part of the legislature to give to the Company any contract rights under the act. In face the act itself, in the plainest language, negatives any thought of contract obligations. By Section 14 it is provided:

> "The state reserves the right at any future time to modify, amend or repeal this act or any part thereof or to cancel or modify any indeterminate permit arising or existing under this act. * * * No such street railway shall be entitled to any damages or compensation in the event of any modification, amendment or repeal of this act or the cancellation or modification of any permit, grant or franchise above referred to."

By its consent to be governed by the act the Company placed itself unreservedly under the regulation and control of the legislature. Its right to protection now rests in the sense of fairness of the legislature and the rights guaranteed to it by both state and federal constitutions. The Company consented "that the terms of this act shall apply to and govern the ownership, control, management, maintenance and operation of the street railway property of said street railways." By so doing it waived its contract rights under its original franchise and placed itself unreservedly under the regulation and control of the state, but in so doing it acquired no vested rights of any nature. Every provision of the act could have been repealed or modified in any form which the legislature saw fit on the day following the filing of the Company's consent or at any time thereafter.

The provisions of the act contain no word of contract. There is nothing in the nature of an agreement. There is no permanency about any right which the company acquired. The statute did not even require the company to accept the act. It was only obliged to state that it desired that the grant of its old franchise should become an indeterminate permit and

"consent" that the terms of the act should apply to and govern the ownership, control, management, maintenance and operation of its property. It surrendered a contract. It consented to be governed by this act, subject to its amendment or repeal. No case has been cited by counsel for either the City or the Commission,—and we have seen none,—which holds that language such as contained in this act constitutes a contract of any nature giving any contract or vested rights.

The old franchise under which the Company was operating (Ch. 200, Sp. Laws 1881) specifically provided that when the grants contained therein were accepted *"the same shall operate as a contract"*, while the law now under consideration with equally specific language, in Section 14, negatives the idea of a contract by reserving the right, without compensation to the Company, to *"modify, amend or repeal this act or any part thereof or to cancel or modify any indeterminate permit arising or existing under this act."*

This question was argued by the Deputy Attorney General of the state, acting on behalf of the Commission, in *City of Duluth v. Railroad and Warehouse Commission*, 209 N. W. 10, and in response to that argument the court said:

> "Since, under a provision in the act, a street railway company before it can become subject thereto must file its consent, it is very ably and forcibly argued by the Deputy Attorney General, appearing for the Commission, that the company thereby enters a contract with the city binding itself to accept whatever rate may be fixed in accordance with the procedure prescribed by the act. That proposition is not in the case. Holding Section 10 constitutional as we do, this suit to enjoin the valuation of after-acquired property of the street railway company, as expressly provided by the act, was properly dismissed, even though the company stand in no other relation to this act than to any general legislative act governing the procedure for rate fixing. Some of the existing street railway companies held franchises for a term of years

with a rate of fare fixed therein. No doubt the provision for filing consent was inserted in the law so as to enable such companies to terminate that relation."

While the argument of the Deputy Attorney General was addressed largely to the thought that the law should be so construed as to prevent the railway company from resorting to the Federal Court and while, as the Supreme Court of Minnesota states, the question of contract was not in the case, in the paragraph immediately preceding, it effectually disposed of the thought which underlay the whole argument the Deputy Attorney General was making, in these words:

> "We are not concerned with the effect the federal courts will give to rates fixed and reviewed as provided in the Brooks-Coleman Act. It is the duty of this court to see that the due process clause of the federal constitution is not violated as well as the same clause in the state constitution, but while so doing we must recognize that our construction and application of a state rate fixing statute does in no manner hinder or preclude the federal courts from inquiring into and determining whether or not the procedure under such statute deprives the parties concerned of property rights in violation of the due process clause of the federal constitution."

(b)

If consent to be governed by the act be construed as in any sense contractual, still there is no way to spell out of it or read into it any agreement not to resort to the Federal Court.

The Company was operating under a franchise contractual in its nature, having a definite term to run and with a fixed right to charge rates therein prescribed. It could not, without its consent, be compelled to surrender this franchise

and waive its right to charge these rates, and for that reason and that only the law provided for the filing of a written declaration that it desired its grant with a definite term should become a permit with an indefinite term and a consent to be governed by the act.

The act then gave to the Commission the "initial and exclusive power and authority * * * to fix and establish rates of fare * * * subject to the powers of the district court in case of appeal thereto as hereinafter provided."

The Minnesota legislature, subject only to the provisions of the state constitution, may control proceedings before the Commission and before the state courts but it has no such power or authority with reference to the federal courts. Under the state constitution the legislature would have no power to delegate to the state court the right to fix and establish rates of fare. That is a legislative act and under the constitution cannot be performed by the courts, but the legislative act having been completed, *"the exclusive power and authority"* of the Commission to fix and establish rates of fare having been completely exercised, the question of the validity of the action of Commission in its exercise of that power becomes a judicial question and as such the manner of its submission to the state court is within the control of the legislature, and in providing for the submission of that judicial question to the state courts the legislature did not undertake to deny to the company the right to have that judicial question submitted to the Federal Court if it so desired.

It must be assumed that the legislature was fully aware that it had no power to prohibit the exercise by the Federal Court of its duties arising under the federal constitution and the acts of Congress. Nothing but the plainest language would warrant the assumption that the state legislature would attempt to accomplish any such result and there is not a syllable in this act which can be so construed. As a matter

of fact, this entire claim on the part of the City and the Commission was based upon the view of the City Attorney and of the Attorney General that the action of the state court under this law is legislative in its nature and that therefore, as the federal courts could exercise only judicial functions, they could not at this point take jurisdiction, but that contention, which was made by the attorneys for all of the appellants before the trial court has now been effectually disposed of by the decision of the state Supreme Court in the case of the *City v. Commission*, referred to above.

(c)

If consent of the Company to be governed by the act were construed as creating a contract binding the Company not to resort to the federal courts, such contract would be invalid.

This question seems to be settled beyond the possibility of controversy by a line of decisions in this court beginning in 1874 with *Home Insurance Company v. Morse*, 20 Wall. 455, and ending in 1922 with *Terral v. Burke Construction Company*, 257 U. S. 529.

In *Home Insurance Company v. Morse*, 87 U. S. 445, there was involved the validity of an agreement entered into by the insurance company, a foreign corporation, as required by the statute of Wisconsin in its aplication for license to transact business in Wisconsin. The statute required the foreign corporation making application for a license to sign a written agreement that it would not remove any action brought against it into the Federal Court.

An action was brought against the company in the state court. Disregarding its agreement, it took the necessary steps to remove the action into the Federal Court. The state court refused to recognize the removal and proceeded to

trial and judgment. The case was then brought by writ of error to this court, where the judgment of the Supreme Court of Wisconsin was reversed with instructions to grant the petition for removal. The precise question, therefore, determined in the action and by the judgment, was the invalidity of the agreement made by the company, as a condition to receiving its license, that it would not remove the action into the Federal Court. The language contained in the power of attorney signed by the company was:

> "And said company agrees that suits commenced in the state courts of Wisconsin shall not be removed by the acts of said company into the United States Circuit or Federal Courts."

The court made an elaborate discussion of the whole question citing a large number of decisions from other courts beginning with *Nute v. Insurance Company*, 6 *Gray*, 174, and held that the agreement was void.

In *Doyle v. Continental Insurance Company*, 94 U. S. 535, the Wisconsin statute again came before the court. The statute, in addition to requiring agreement not to remove a case into the Federal Court, also contained a provision that in case the company violated its agreement its license should be revoked. The insurance company removed the case brought against it into the Federal Court and then brought an action against the Secretary of State to enjoin him from revoking its license.

This case did not, as did the other, involve the validity of the agreement but it did involve the question of the right of the state to revoke the license for the violation of the agreement. The court specifically approved the holding of the *Morse* case, that the agreement was void but held that the law, so far as it provided for the cancellation of the license,

was valid. As to the point decided in the *Morse* case it was said:

> "It was held on the general principles of law that although an individual may lawfully omit to exercise his right to transfer a particular case from the state courts to the federal courts and may do this as often as he thinks fit in each recurring case, he cannot bind himself in advance by an agreement which may be specifically enforced thus to forfeit his rights. This was upon the principle that every man is entitled to resort to all the courts of the country to invoke the protection which all the laws and all the courts may afford him and that he cannot barter away his freedom or his constitutional rights."

Three of the Justices dissented and in the dissenting opinion of Justice Bradley he said:

> "The argument used, that the greater always includes the less and therefore that if the state may exclude the appellees without any cause it may exclude them for a bad cause, is not sound. It is just as unsound as it would be for me to say that, because I may without cause refuse to receive a man as my tenant, therefore I may make it a condition of his tenancy that he shall take the life of my enemy or rob my neighbor of his property."

In *Barron v. Burnside*, 121 U. S. 186, the court considered the validity of the Iowa foreign corporation statute. This statute required the application for permit to contain a "stipulation that said permit shall be subject to each of the provisions of this act." and one of the provisions of the act was that if any such corporation should remove an action brought against it into the Federal Court it should forfeit the permit granted to it. Chicago & Northwestern Railroad Com-

pany, a foreign corporation, was operating in this state without a permit. One of its locomotive engineers was arrested, charged with knowingly operating his engine for the company and thus violating the act. The state court upheld the validity of the statute and the matter was brought to this court on a writ of error. This court reviewed the *Morse* and *Doyle* decisions involving the Wisconsin statute and then said:

> "In both of the cases referred to the foreign corporation had made an agreement not to remove into Federal Court suits to be brought against it in the state court. In the present case no such agreement has been made but the locomotive engineer was arrested for acting as such in the employment of the corporation because it had refused to stipulate that it will not remove into the Federal Court suits brought against it in the state court as a condition of obtaining a permit and consequently has not obtained such permit. Its right, equally with any individual citizen to remove into the Federal Court under the laws of the United States, such suits as are mentioned in the third section of the Iowa statute, is too firmly established by the decisions of this court to be questioned at this day, and the State of Iowa might as well pass a statute to deprive an individual citizen of another state of his right to remove such suits.
>
> "As the Iowa statute makes the right to a permit dependent upon the surrender by a foreign corporation of the privilege secured to it by the constitution and laws of the United States, the statute requiring the permit must be held to be void."

In *Southern Pacific Company v. Denton*, 146 U. S. 202, the court passed on the validity of the Texas foreign corporation law. The question was as to the jurisdiction of an action brought against the railway company in a district other than the residence of the plaintiff, as required by the judiciary act. Plaintiff contended that the defendant had consented to be

sued in any district within the state and had agreed that any removal of an action brought against it into the Federal Court should result in forfeiture of its permit, all as provided by the statute, which had been agreed to by the railway company, a Kentucky corporation. The court said:

> "But that statute requiring the corporation, as a condition precedent to obtaining a permit to do business within the state, to surrender the right and privilege secured to it by the constitution and laws of the United States, was unconstitutional and void and could give no validity or effect to any agreement or action of the corporation in obedience to its provisions." Citing the *Home Insurance Company* and *Barron v. Burnside* cases.

In *Security Mutual Life Ins. Co. v. Prewitt*, 202 U. S. 246, the court considered and upheld the Kentucky foreign corporation law. This statute did not require the company to sign an agreement in advance not to remove its suits, as in the Wisconsin law, nor did it contain any provision that the company, in applying for a license, should stipulate that the license was subject to the other provisions of the statute, as in the Iowa law considered in Barron v. Burnside, supra, and the Texas law in *Southern Pacific v. Denton*, supra, but did provide that if any company removed a suit into the Federal Court or brought an action against a citizen in the Federal Court the Commissioner should forthwith revoke the company's authority to do business in the state and the action before the court was one brought to enjoin the Commissioner from threatened revocation. The court analyzed the two cases involving the Wisconsin law and said, with reference to the agreement required by that statute:

> "This court held that the agreement was void inasmuch as, if carried out, it would oust federal courts of the jurisdiction given them by the constitution and statutes

of the United States. It was said that the statute of Wisconsin was an obstruction to the right of removal provided for by the constitution of the United States and the laws made in pursuance thereof, and that the agreement of the insurance company derived no support from the unconstitutional statute, and it was void as it would have been had no such statute been passed. * * *

"It will be seen the statute provided that in the power of attorney appointing an agent for the company within the state, there should be an agreement that the company would not remove a case to a Federal Court, and the statute was held to be void."

And further:

"In these two cases this court decided that any agreement made by a foreign insurance company not to remove a cause to the federal court was void, whether made pursuant to a statute of the state providing for such agreement, or in the absence of such statute; but that the state, having power to exclude altogether a foreign insurance company from doing business within the state, had power to enact a statute which, in addition to providing for the agreement mentioned, also provided that if the company did remove a case from the state to the federal court, its right to do business within the state should cease, and its permit should be revoked. It was held there was a distinction between the two propositions, and one might be held void and the other not."

The court then considers the case of *Barron v. Burnside*, involving the Iowa statute, and pointed out that that statute was held invalid for the reason that its central thought was the requirement of an agreement not to remove a suit into the Federal Court.

With reference to the case of *Southern Pacific Company v. Denton*, the court said that a statute requiring the corporation, as a condition precedent to obtaining a permi

to do business within the state, to surrender a right and privilege secured by the federal constitution and laws, was unconstitutional and void.

The real point in this *Security Mutual Life Ins. Co.* decision was stated by the court as follows:

> "As the state has power to refuse permission to a foreign insurance company to do business at all within its confines, and as it has power to withdraw that permission when once given, without stating any reason for its action, the fact that it may give what some may think a poor reason or none for a valid act is immaterial."

And further:

> "The truth is that the effect of the statute is simply to place foreign insurance companies upon a par with the domestic ones doing business in Kentucky. No stipulation or agreement being required as a condition for coming into the state and obtaining a permit to do business therein, the mere enactment of a statute which, in substance, says if you choose to exercise your right to remove a case into federal court, your right to further do business within the state shall cease and your permit shall be withdrawn, is not open to any constitutional objection."

This decision by a majority of the court was dissented from by Justices Day and Harlan, Justice Day writing the dissenting opinion, and in the course of that opinion he said:

> "If a state may lawfully withhold the right of transacting business within its borders, or exclude foreign corporations from the state upon the condition that they shall surrender a constitutional right given in the priv-

ilege of the companies to appeal to the courts of the United States, there is nothing to prevent the state from applying the same doctrine to any other constitutional right which, though differing in character, has no higher or better protection in the constitution than the one under consideration. If the state may make the right to transact business as dependent upon the surrender of one constitutional privilege, it may do so upon another, and finally upon all. In pursuance of the principle announced in this case, that the right of the state to exclude includes the right, when exercised for any reason or for no reason, the state may say to the foreign corporation, 'You may do business within this state, provided you will yield all right to be protected against deprivation of property without due process of law, or provided you surrender your right to have compensation for your property when taken for private use, or provided you surrender all right to the equal protection of laws;' and so on through the category of rights secured by the constitution, and deemed essential to the protection of people and corporations living under our institutions."

In *Harrison v. St. Louis & San Francisco Railroad Co.*, 232 U. S. 318, the court had under consideration the foreign corporation law of Oklahoma. This statute, like the Kentucky statute, omitted the requirement for an agreement in advance not to resort to the federal courts, which had been held invalid in the cases arising under the Wisconsin and Iowa laws. The action was brought in the federal court and the state officers enjoined from enforcing a forfeiture of the company's right to continue in business after removing an action into the Federal Court. In the course of its decision upholding the lower court, this court, by Chief Justice White, said:

"It may not be doubted that the judicial power of the United States as created by the constitution and provided for by Congress pursuant to its constitutional authority is a power wholly independent of state actior,

which therefore the several states may not by any exertion of authority of any form, directly or indirectly, destroy, abridge, limit or render inefficacious."

In *Donald v. Phil. & R. Coal & Iron Co.*, 241 U. S. 328, the court upheld the action of the lower court in enjoining state authorities from revoking the license of a foreign corporation to do business in Wisconsin under a statute which provided that whenever any foreign corporation doing business in that state should remove an action into the Federal Court its license should be revoked. The court said:

"Consideration of the Wisconsin statute convinces us that they seek to prevent appellees and other foreign commercial corporations doing local business from exercising their constitutional right to remove suits into federal courts. To accomplish this is beyond the state's power.

"We are asked, in effect, to re-consider the question discussed and definitely determined in Harrison v. St. Louis, etc., 232 U. S. 318. We there said the judicial power of the United States as created by the constitution and provided for by Congress pursuant to its constitutional authority is a power wholly independent of state action, and which, therefore, the several states may not by any exertion of authority, in any form, directly or indirectly, destroy, abridge, limit or render inefficacious."

This analysis of the cases in this court, beginning with the *Morse* case, decided in 1874, and ending with the *Philadelphia & Reading* case, in 1916, shows that from the beginning this court held that any agreement required or made as a condition to obtaining a license to trasact business, by which a corporation agreed not to exercise its right, given under the federal constitution and laws, to resort to the federal courts either by independent action or removal, was void.

The *Doyle* case, with reference to the Wisconsin statute, held that while such an agreement would be void and could not be enforced, a state might by positive law provide that the right of a foreign corporation to continue business in the state could be revoked for any reason, good or bad, including resort by the corporation to the federal courts. This position was upheld as late as the *Prewitt* case, supra, but was finally abandoned in *Terral v. Burke Construction Company*, 257 U. S. 529, where the court definitely overruled the *Doyle* and *Prewitt* cases and said, in a unanimous decision written by the present Chief Justice:

> "The principle established by the more recent decisions of this court is that a state may not in imposing conditions upon the privilege of a foreign corporation's doing business in the state, exact from it a waiver of the exercise of its constitutional right to resort to the federal courts, or thereafter withdraw the privilege of doing business because of its exercise of such right, whether waived in advance or not. The principle does not depend for its application on the character of the business the corporation does, whether state or interstate, although that has been suggested as a distinction in some cases. It rests on the ground that the federal constitution confers upon citizens of one state the right to resort to federal courts in another; that state action, whether legislative or executive, necessarily calculated to curtail the free exercise of the right thus secured, is void because of the sovereign power of a state in excluding foreign corporations, as in the exercise of all others of its sovereign powers, is subject to the limitations of the supreme fundamental law. It follows that the cases of Doyle v. Continental Ins. Co., 94 U. S. 535, and Security Mutual Life Ins. Co. v. Prewitt, 202 U. S. 246, must be considered as overruled, and that the views of the minority judges in those cases have become the law of this court."

In *Nashua River Paper Co. v. Hammermill Paper Co.*, 223

Mass. 8, the court considered the validity of the following clause in a contract:

> "No action at law, equity or chancery shall be instituted or maintained by the corporation in any court of any state of the United States or in any circuit or district court of the United States against the company other than in the courts of the Common Pleas of the State of Pennsylvania."

This was an ordinary contract between a Massachusetts corporation and a Pennsylvania corporation. The court held the stipulation invalid as against public policy. The case contains a review of the authorities, including the *Morse* case, in this court. After a full discussion of the cases and speaking particularly of the *Nute* case, which was relied on in the *Morse* case, the court said:

> "That case, as has been pointed out, states a general principle which has been adopted and prevails in all federal courts by reason of the binding decisions of the United States Supreme Court (citing the *Morse* and *Doyle* cases). The same rule prevails generally in all states where the question has arisen. It relates to a matter as to which uniformity of decision and harmony of law among the several jurisdictions of this country is desirable. It would be unfortunate if contracts touching a subject of general commercial interest, and which may be broadly operative as to jurisdiction, should be held valid in one state and invalid in all others. All these circumstances bring us to the conclusion that the clause in the contract here in question is unenforceable, and that therefore the action can be maintained in the courts of this commonwealth.

In *Prince Steam-Shipping Co. v. Lehman*, 39 Fed. 704, the court held invalid provision in a charter-party as follows:

> "It is further agreed that all disputes, if any, whether arising before or after shipment of cargo, and whether arising on this charter-party or on bills of lading signed thereunder, shall be settled at port of discharge only."

saying that such agreements have been repeatedly held to be against public policy and void.

In *Slocum v. Western Insurance Co.*, 42 Fed. 235, in holding invalid a clause in an insurance policy requiring any action thereon to be brought in a certain court in the city of Toronto, it was said:

> "The authorities, I think, sustain the general doctrine that a stipulation inserted in a contract limiting the remedy for a breach of the contract to a particular forum is not a valid stipulation. Citing a number of cases, including the *Nute* case.

In The Etono, 64 Fed. 880, a bill of lading under which goods were shipped provided that all damage claims should be "settled direct with the owners according to English law to the exclusion of proceedings in the courts of any other country." This was held invalid.

In *Mutual Reserve Fund v. Cleveland, etc.*, 82 Fed. 508, the Circuit Court of Appeals for the 6th circuit, which then included Justices Taft and Lurton, held invalid a stipulation in a policy of insurance that no suit in law or equity should be brought upon it except in a circuit court of the United States.

The Company in the case at bar consented to waive its contract rights under its old franchise and accept the indeterminate permit with full power or regulation, modification and repeal by the legislature. We think we have demonstrated that this action of the Company was never intended by either

the Company or the state to deprive the Company of its right under the federal constitution and laws to go into the Federal Court, and that even if both parties had so intended any contract attempting to carry any such intention into effect would be utterly void.

Cases Relied On By Appellants

Attorneys for the commission and the city cite a number of cases under their claim of the existence of a contract not to resort to the federal courts. We think none of these cases, nor any that can be found, give any support to such proposition. Short reference will be made to some of the cases relied on.

In *Public Service Commission v. St. Cloud*, 265 U. S. 352. it was determined that a contract fixing maximum rate for gas existed between the city and the company in a franchise which provided that:

> "In consideration of the rights and privileges herein granted the grantee hereby covenants and agrees that it will * * * erect * * * an efficient coal gas generating plant or system, of ample capacity, and after the erection thereof will manufacture and offer for sale to the city and its inhabitants coal gas of at least 14 candle power,"
>
> and
>
> "The grantee is authorized hereby to sell illuminating gas when the works therefor shall have been completed * * * at a price of not to exceed"

a certain maximum therein stated. The court said:

> "We think that the language of the ordinance viewed in its entirety clearly shows that it was the intention of

> the parties to enter into a contract for the construction of gas works and the manufacture and supply of gas to the city and its inhabitants during the thirty year period at the maximum rate prescribed."

There is, of course, no similar language in Chapter 278, under which we are operating.

In *Georgia Railway & Power Co. v. Town of Decatur*, 262 U. S. 432, the principal question was whether or not the contract was within the power of the town. The Supreme Court of Georgia, in the case of the company against the Commission 149 Ga. 1, said:

> "The physical existence of a contract in 1907 between the Town of Decatur and the lessor of applicant prescribing a five cent maximum fare between Decatur and Atlanta is admitted."

In *Hall v. Geiger*, 242 U. S. 539, the court construed the constitutionality of the Ohio "blue sky" law. No question of the existence of a statutory contract was involved. The case has no application and is cited only for a statement that "the fact that the statute designates a particular court to review the executive findings does not affect the validity" of the statute. If we were attacking the validity of Chapter 278 because of the authority given in Section 10 to the state courts, this quotation might seem to have some bearing, but we are not making any such attack.

The city cites a number of cases from this court holding that where federal questions are brought to this court on writ of error from the decision of the highest state court, the federal question must have been presented to and passed upon by the state court and that the rules of practice of the state under which the federal question is passed upon will

be upheld if they give a fair oportunity to raise the question. *John v. Paullin, etc.*, 231 U. S. 583, is an illustration of this class of cases. This action arose in the state court and the controversy involved in part the interpretation of certain laws of the United States. The defeated party attempted to have the judgment reviewed by the state Supreme Court. That court held that its appellate jurisdiction had not been properly invoked and did not pass upon the federal question involved. This court declined to review the action of the state Supreme Court and said:

> "Certainly no federal right was denied by that court and if, as was held by it, its appellate jurisdiction was not properly invoked, no federal question was before it for decision.
>
> "Without any doubt it rests with each state to prescribe the jurisdiction of its appellate courts, the mode and time of invoking that jurisdiction and the rules of practice to be applied in its exercise and the state law in practice in this regard are no less applicable when federal rights are in controversy than when the case turns entirely upon questions of local or general law."

In *Columbus Railway Power & Light Co. v. Columbus* 249 U. S. 399, the court considered the rights of the company operating under a franchise fixing the rate of fare for a period of 25 years. The question had already been settled as to the character of the franchise and quoting from an earlier decision the court said:

> "In reason, the conclusion that contracts were engendered would seem to result from the fact that the provisions as to rates of fare were fixed in ordinances for a stated time and no reservation was made of a right to alter; that by those ordinances existing rights of the corporations were surrendered, benefits were conferred upon the public, and obligations were imposed upon the

> corporations to continue those benefits during the stipulated time. When, in addition, we consider the specific reference to limitations of time which the ordinances contained, and the fact that a written acceptance by the corporations of the ordinances was required, we can see no escape from the conclusion that the ordinances were intended to be agreements binding upon both parties, definitely fixing the rates of fare which might be thereafter charged."

The consent of the Company in the case at bar to be governed by the provisions of the act and that its existing grant might become an indeterminate permit, subject to revocation at any time, we submit lacks every element of contractual nature existing in the Columbus franchise.

In *Opelika v. Opelika Sewer Co.*, 265 U. S. 215, the sewer company was operating under an ordinance which purported to grant a right for 30 years and to authorize the company to charge rates not exceeding a fixed maximum. The ordinance provided that upon its acceptance it "shall thereupon become and be a contract between" the company and the city. The company filed such acceptance. The court said there can be no question that the instrument purported to be a contract and that it was a valid one binding the sewer company not to charge more than the prescribed rates.

It is submitted that none of these cases relied upon by the commission and the city is any authority for the proposition that the Company's consent to be governed by this act and have its grant for a definite period changed into an indeterminate permit, subject to revocation at any time, constituted a contract of any nature, and neither these cases nor any ohers that can be found are authority for the proposition that a contract, such as the commission and the city rely upon, prohibiting the company from resorting to the federal courts, would be valid if made.

III.

The Action Was Not Premature.

It is contended in the briefs of both the commission and the city that this action was brought prematurely in the district court for the reason (a) that comity and convenience required that the company exhaust its remedy under the state statutes and in the brief of the City for the reason (b) that no test was made of the rates prescribed by the commission's order.

The point as to the necessity for a test period was urged before the court of three judges on the application for interlocutory injunction and was disposed of in the oral opinion of Judge Sanborn referred to hereinafter.

A motion was made by the defendants and intervenor to dismiss the action and for judgment on the pleadings. This was heard at St. Paul on August 6th, 1923, and in denying those motions and holding that the company was not obliged to proceed further under the state statutes, the court said:

> "As it presents itself to my mind the matter before the court at this time is confined within rather narrow limits. The railway company, pursuant to Chapter 278 of the Laws of 1921 of Minnesota, has been before the Railroad and Warehouse Commission and the commission has made its findings and conclusions. At that point legislative action came to an end and the railway company, if it so desired, had the opportunity, as provided by the act itself, of appeal to the state district court. It did not avail itself of that opportunity but started an independent suit in the federal court, claiming that by the action of the commission it would be deprived of its property without due process of law because the rates fixed were confiscatory."

(a)

No Principle of Comity or Convenience Prevented the Company from Bringing this Action in the Federal Court as soon as the Commission's Rate Order was Made.

(1) *The Legislative Stage was ended; the Judicial Stage had been Reached and this Action was not premature.*

The order of the commission fixing rates was the final legislative act and the judicial stage was then reached. Further proceedings in the state court on appeal from the Commission's order, as authorized by the statute, are judicial in their nature and not legislative. This being so, the company at that stage had the option of appealing to the state court or bringing an action in the Federal Court. This question has been settled by the decision of the Minnesota Supreme Court, handed down since this appeal was taken in the case of *City of Duluth v. Railroad & Warehouse Commission of the State of Minnesota*, 209 N. W. 10. This action was brought by the City of Duluth against the Commission to enjoin further proceedings by the Commission under Chapter 278 on the ground that Section 10 of the act delegated legislative power to the courts and was therefore unconstitutional. The Supreme Court answered that claim of the City:

> "We see nothing in Section 10 imposing legislative or administrative duties upon the court." (Page 13)

Section 10 provides for an appeal from an order of the Commission to the state district court; for a trial of the issues and that the court

> "in any case involving rates * * * shall find and determine the fair value of such property and also what is a reasonable rate of return thereon, and shall affirm, modify or reverse any order or finding of such commis-

sion as may be required by law. The judgment or any order of such court shall be certified to said commission and the commission shall thereupon modify, reverse or put into effect its order or findings so as to conform to the judgment, order and findings of such court."

Article 3 of the state constitution provides:

"The powers of the government shall be divided into three distinct departments, a legislative, executive and judicial; and no person or persons belonging to or constituting one of these departments shall execute any of the powers properly belonging to either of the others except in the instances expressly provided in this constitution."

The Supreme Court, in holding Chapter 278 constitutional, said:

"The appeal as well as the action is based solely on the proposition that Section 10, Chap 278, Laws of 1921 * * * is unconstitutional and being the keystone of the act the whole thereof must fall upon its removal; * * *

"Fixing the rate at which a public utility must render service is concededly a legislative or administrative function (Steenerson v. G. N. Ry., 69 Minn. 353) and the contention is that Section 10, above quoted, invests the court, the judiciary branch of the government, with legislative powers, thereby contravening Article 3 of the state constitution." (page 11)

The court then discusses the provisions of Section 10 of the act, points out the duties of the court and of the commission thereunder, refers to the statute in force when the *Steenerson* case was decided and then says:

"We have no doubt that the provisions for an appeal to the court in the act involved in the Steenerson case was in deference to the opinion of the Federal Supreme Court in Chicago, Milwaukee & St. Paul Ry Co. v. Minnesota, 134 U. S. 418, and that Section 10 of the act here assailed was influenced by such decisions of that court as Bacon v. Rutland Ry. Co., 232 U. S. 134, Detroit & Mackinac Ry. Co. v. Mich. Com., 235 U. S. 402, and Ohio Valley Water Co. v. Ben Avon Borough, 253 U. S. 287—in the first two of which enactments, granting substantially the same powers and duties to the court on appeal from the rate fixed by a commission as in Section 10, were held not to confer legislative functions upon the court, and in the last of which the intimation is plain that such a judicial review as is afforded by said Section 10, both as to the law and the facts, is essential to a valid rate fixing * * *

"The inference is plain that, unless the state law provides complete judicial review or investigation by appeal, or otherwise, of a legislative or administrative rate fixed for future services to be rendered by a public utility, the rate fixed is of little validity or effect. To give standing and authority to the rate, to be fixed under the act in question, the lawmakers took pains to provide not only that the commission should hear, investigate, and determine the value and bearing of all the factors which go to make a fair rate of the future, but that, on appeal, the court shall independently on its own judgment and upon such evidence as may be adduced before it, determine at least two of the main factors which enter into rate making—the value of the property of the street railway and what is a fair return thereon * *

"Courts are strictly within their own territory when determining controversies between parties concerning past or present facts. In rate fixing for the future the parties concerned may differ as to existing facts, among others, the two most important ones referred to, and it would seem entirely proper that there be a judicial determination of the same * * *

"As already stated, Section 10 does not in words require the court to fix the rate but to affirm, modify or reverse any order or finding of such commission as

may be required by law. If the rate be found confiscatory, the court can neither fix a new rate nor modify the one under review. Its findings as to existing facts which were litigated on the appeal are binding on the commission, and the matter goes back to the commission, to put into effect orders or findings which conform to the action of the court. *We see nothing in Section 10 imposing legislative or administrative duties upon the court,* or any substantial departure therein from the act involved in the Steenerson case, supra, or State v. Great Northern Ry. Co., 130 Minn. 57." (page 13)

(Italics ours)

This question was raised with reference to a similar provision in the Telephone law by the Attorney General in *Northwestern Bell Telephone Co. v. Hilton,* 274 Fed. 384. It was contended there by the Attorney General (Page 389) that the legislative function of establishing reasonable rates for the plaintiff company would not have been completed until after the order of such district court on appeal, if such appeal had been taken, and that a suit brought in a Federal Court before such order is premature and the court without jurisdiction in the premises. The court said:

"But the claim is made by the defendant that the plaintiffs had the right to appeal from the order of February 9, 1921 to the state district court and until that was done and the state district court had acted, the legislative stage of the inquiry as to rates had not passed and the judicial stage had not been reached and that therefore the present suit is premature. * * * The state district court, under the laws of Minnesota as construed by the Supreme Court of the state, could not put itself in the place of the Railroad and Warehouse Commission and re-try the issues and establish new rates. It had no legislative power but judicial power only. Therefore in my judgment, when the order of February 9, 1921 was made by the Railroad & Warehouse Commission the legislative stage had come to an end and the judicial

stage had been reached. That being so, there can be no question but what at that stage the company might resort to the state district court or to the federal district court, as it saw fit. It chose the latter forum."

The same point was made again in the trial of the case now here on appeal, and the court in its opinion, found in 4 Fed. 2d, at page 545, said:

"At the outset the contention is again made by defendants that the suit is premature. This question was passed upon at an earlier stage in this case and it is not necessary to discuss it here at length. The conclusions heretofore reached are adhered to, viz.; that when the Railroad & Warehouse Commission made and filed its findings and order of July 13, 1922, fixing the rate of fare for plaintiff company the legislative stage was ended at that point and the judicial stage was reached; that the hearing before the state district court on appeal which is provided for in Section 10 of the act (Chapter 278 Laws of 1921 of the State of Minnesota) is judicial and not a continuation of the legislative rate-making process, otherwise the section is void; and finally, that under such circumstances the street railway company had the right to bring the present suit in the federal court." Citing Bacon v. Railway Co., 232 U. S. 134; Prendergast v. Tel Co., 262 U. S. 43; N. W. Bell Tel. Co. v. Hilton, 274 Fed. 384; Steenerson v. G. N. Ry. Co., 69 Minn. 353; State v. G. N. Ry. Co., 130 Minn. 57, and other cases.

These two decisions of the federal district court of Minnesota were handed down before the decision of the state Supreme Court upholding the constitutionality of the law and the *Steenerson* and *Great Northern Railway* cases, referred to by the federal district court, were both relied upon and followed by the state Supreme Court in upholding the constitutionality of the law.

In *Bacon v. Rutland Ry. Co.*, 232 U. S. 134, the court had under consideration an action to enjoin the Public Service Commission of Vermont from enforcing an order. The contention was made by the commission that the action was premature because the company had not taken an appeal to the Supreme Court as authorized by statute. The statute authorizing the appeal provided that upon appeal the court "may remand the case to said * * * (commission) with such mandates as law or equity require; and said (commission) shall enter judgment, order or decree in accordance with such mandates." This provision of the Vermont statute is identical in substance with the provision in the Minnesota statute, which is:

> "The judgment or any order of such court shall be certified to said commission and the commission shall thereupon modify, reverse or put into effect its order or findings so as to conform to the judgment, order and findings of such court."

This court, in its opinion, referring to the Vermont statute, said:

> "It is apparent on the face of these sections that they do not attempt to confer legislative powers upon the court. They only provide an alternative and more expeditious way of doing what might be done by a bill in equity. Whether the alternative is exclusive or concurrent, whether it opens matters that would not be open upon a bill or not, if exceptions are taken (which does not appear in this case) is immaterial; the remedy in any event is purely judicial: to exonerate the appellant from an order that exceeds the law."

This case is cited and relied upon by the Supreme Court of Minnesota in its decision upholding the constitutionality of

the law now under consideration and is a direct authority for the proposition which we now make,—that with the making of the commission's order the judicial stage was reached, the company had the option, if dissatisfied, of appealing to the state court or bringing the action in the Federal Court, and that this action was not premature.

In *Prendergast v. Telephone Co.*, 262 U. S. 43, this court held that upon the making by the commission of the rate orders in question the proceedings had reached the judicial stage, entitling the company to resort to the Federal Court for relief, and said:

> "Here the commission is vested with the final legislative authority of the state in the rate-making process, the authority exercised by the state courts on a review by certiorari being purely judicial but having no legislative character."

In *Detroit & Mackinac Ry. v. Michigan Railroad Commission*, 235 U. S. 402, the court had under consideration the Michigan statute providing for a Railroad Commission. This statute gave the commission authority to fix rates and provided that any carrier or person dissatisfied with the rates may sue the commission in a state circuit court to set aside the rates as unlawful or unreasonable and that the evidence taken in such action shall be transmitted to the commission for its consideration, and if the original order be not rescinded or changed judgment shall be rendered thereon.

It will be noted that under this statute the proceeding before the commission was in effect suspended, the action was taken before the court and the additional evidence submitted to the court was transmitted to the commission. The commission then had opportunity to rescind or modify its order, and judgment was not to be entered in the court until

the commission had taken this additional action. Claim was made that the action of the court was in its nature ligislative. It was held by a three-judge court, as reported in 203 Fed. 864 that this action of the court was in its nature judicial and this holding was affirmed on appeal to this court where this language was used:

"The important provisions (of the Michigan statute) are that any common carrier or other party in interest, dissatisfied with the orders of the commission, may bring suit in the state circuit court in chancery to set aside the order on the ground that the rates fixed are unreasonable and the court is given power to affirm, vacate or set aside the order * * * in whole or in part and to make such other order or decree as the courts shall decide to be in accordance with the facts and the law. If different or additional evidence is introduced the court, before judgment, is to transmit a copy of it to the commission and the commission may alter or rescind its order and is to report its action to the court and the judgment is to be rendered, as though the last action of the commission had been taken at first. (citing the act) Taking the two provisions together, it seems plain the words 'such other order or decree' in the first do not embrace a change in the rates fixed, but only such other orders or decrees as are incident to an equity cause. If the order of the commission is to be modified by fixing a new rate, that is to be done upon the new evidence by the commission. This interpretation not only is the natural one upon the face of the statute, but avoids the difficulty that otherwise would arise under the constitution of the state. * * *

"The distinction between the judicial function of declaring a rate unreasonable and the legislative one of establishing a rate as reasonable is developed in (citing a number of cases). And in Bacon v. Rutland, 232 U. S. 134, it was held that statutory provisions very much like those of Michigan, under a constitution that in like manner separated legislative, executive and judicial powers, gave only the last to the courts."

In *Chicago Railway Co. v. Illinois Commerce Com.*, 277 Fed. 970, at 974, the court upheld its jurisdiction against the claim that the action was premature. The court said:

> "The order of the Illinois Commerce Commission was a complete exercise of the legislative power of the state, and was in force immediately after its passage, notwithstanding a motion to reconsider might have been urged and entertained. If the State of Illinois, vesting the power to regulate rates in the Commerce Commission, had provided that the orders of the commission should not be put into effect until after a certain time, within which an application for a rehearing could be made, another question would be involved; but the statutes of Illinois did not so provide, and the granting or denying of a petition for re-hearing being wholly within the discretion of the commission, the legislative act was complete upon the entry of the order.
>
> * * *
>
> "It is quite apparent from a reading of Prentis v. Atlantic Coast Line, above referred to and relied upon by defendants, that there the court of first instance was the final legislative body, just as in this case the Illinois Commerce Commission was the final legislative body. The Prentis case was carefully considered by Judge Hook in A. T. & Santa Fe Railway Co. v. Love et al, 174 Fed. 59, and by Judge Sanborn in the same case on appeal, 185 Fed. 321, and the logic of the opinions in those cases makes it quite impossible for a different conclusion to be reached here."

In *Abilene & S. Ry. Co. v. United States*, 288 Fed. 102. the three judges granted a temporary injunction to restrain the enforcement of an order of the Interstate Commerce Commission against the objection that the action was prematurely brought inasmuch as the act gave the plaintiff the right to apply to the commission for a re-hearing and that remedy should be exhausted before the suit was instituted. The court said:

"The application for a re-hearing does not operate to stay the execution of the commission's order. The act provides that it be not stayed on such an application unless the commission by special order grants a stay. Nothing could have been done by plaintiff pending application for rehearing that would have stayed the execution of the order as a matter of right. We think plaintiffs were entitled to take the order as final for the purpose of this proceeding. See Chicago Ry. Co. v. Illinois Commerce Com., 277 Fed. 970."

This decision was affirmed in *United States v. Abilene & S. Ry. Co.*, 265 U. S. 274.

In *Monroe Gas, Light & Fuel Co. v. Mich. P. U. Com.*, 292 Fed. 139, decided June 9th, 1923, the commission had made its order, no other proceeding had been taken. The court said:

"If a preliminary injunction otherwise should issue, we cannot rightfully deny it just because the commission announces that, if this rate shall finally be found non-compensatory, it will permit the loss to be amortized through a later rate. This policy is thoroughly fair, and is to be commended; but this commission is under no legal duty to take that course, and its intentions or its personnel may change. When the court sees a case of week by week and month by month continuance of confiscation, even if each monthly loss is small, the plaintiff is entitled to his injunction without waiting for possible future relief, unless for reasons not here present. See Prendergast v. New York Tel. Co. and Oklahoma Co. v. Commission, supra.

"It is suggested, perhaps not strenuously, that the utility has not exhausted its remedy through appeal to the Michigan courts. Prentis v. Atlantic Coast Line Co., 211 U. S. 210. It was held in Detroit, etc. v. Mich. Ry. Com., 203 Fed. 864, that the statutory power of the Michigan courts in an analogous case was judicial, not legislative.

> This was affirmed by the Supreme Court of the United States, 240 U. S. 564. We are not aware that it has been questioned by the Supreme Court of Michigan. It follows that the statutory appeal, and an application to a federal court under the fourteenth amendment are alternative, elective remedies. Bacon v. Rutland Co., 232 U. S. 134, The Prendergast case, supra."

Under its claim that comity and convenience require that the company should have taken its appeal into the state court rather than bringing this action into the Federal Court, the city cites three tax cases which merely illustrate the well settled rule that payment of the tax will not be enjoined as invalid where the taxpayer has not exhausted his remedies before the administration board nor where the taxpayer has an adequate remedy at law in resisting the payment of the tax.

In *Gorham Mfg. Co. v. State Tax Commission*, 266 U. S. 265, an injunction against the collection of the tax was denied where the taxpayer had not exhausted his remedy before the administrative board.

In *Keokuk & Hamilton Bridge Co. v. Salm*, 258 U. S. 122, in upholding the action of the lower court in refusing an injunction against the collection of the tax, this court points out that the taxpayer had not exhausted his remedy before the administrative body and had an adequate remedy at law in resisting the payment of the tax, and in *Farncomb v. Denver*, 252 U. S. 7, the other case cited by the city, the question was as to the validity of a local assessment. The taxpayer had failed to object to the assessment, as required by the city charter. This court held the charter provision valid and that the taxpayer, by failing to make his objection at the proper time, was precluded from making any further objection to the validity of the assessment.

There is nothing in these tax cases to support the city's position here.

The Minnesota Supreme Court, in upholding the law in question, relied also upon the cases of *Steenerson v. G. N. Ry. Co.*, 69 Minn. 353, and *State v. G. N. Ry. Co.*, 130 Minn. 57, in both of which it was held that under similar statutes the power delegated to the court was strictly judicial.

We think that the case from Minnesota upholding the constitutionality of this law in question, together with the decisions of this court construing the laws of Vermont and Michigan, furnish all of the authority required for our proposition that the legislative act of rate-making was completed and the judicial stage had been reached when this action was brought, and that therefore the action was not premature.

(2) *This action was not premature even if the duties of the court on appeal under the provisions of Section 10 be considered as legislative and not judicial.*

Following the decision of the *Prentis* case, 211 U. S. 210, under what we think was a misapprehension of that decision, some of the lower federal courts, acting under what they conceived to be a rule of comity, declined to proceed with actions involving rates so long as anything further remained that could be done in the state courts under the provisions of the state law. The misapprehension that we think existed as to the effect that should be given to this decision was cleared up by the terse expression of the Justice of this court who wrote the *Prentis* decision when he said in *Oklahoma Natural Gas Company v. Russell*, 261 U. S. 290, that

> "rules of comity or convenience must give way to constitutional rights,"

in a decision which reversed the order of the lower court in denying temporary injunction against the enforcement of

rates fixed by the commission and held that, notwithstanding the pendency of the appeal to the Supreme Court of the state, as authorized by the constitution, the plaintiffs were entitled to a temporary injunction restraining the enforcement of the rate order where the supersedeas had been refused in the appeal proceeding. The injunction had been denied upon the application to three judges upon the authority of the *Prentis* case. With reference to that the Supreme Court said:

> "If the plaintiffs respectively can make out their case, as must be assumed for present purposes, they are suffering daily from confiscation under the rate to which they now are limited. They have done all that they can under the state law to get relief and cannot get it. If the supreme court of the state hereafter shall change the rate, even nunc pro tunc, the plaintiffs will have no adequate remedy for what they may have lost before the court shall have acted. Springfield Gas & E. Co. v. Barker, 231 Fed. 331, 335. In such a state of facts, Prentis v. Atlantic Coast Line Company has no application. See Love v. Atchison, etc., 185 Fed. 321, 324, 325. Rules of comity or convenience must give way to constitutional rights. In the case cited there was no doubt as to the jurisdiction of the circuit court, but simply a decision that the bills should be retained to await the result of appeals if the companies saw fit to take them. The companies had made no effort to secure a revision and there had been no present invasion upon their rights, but only the taking of preliminary steps toward cutting them down. In such circumstances it was thought to be more reasonable and proper to await further action on the part of the state.
>
> "As in our opinion the district court had jurisdiction and a duty to try the question whether preliminary injunctions should issue, and as that question has not yet been considered, the cases should be remanded to that court, with directions to proceed to the trial."

In *Pacific Telephone & Tel. Co. v. Kuykendall*, 265 U. S. 196, the claim was made that the action of the Federal Court

was premature because the company had not exhausted its remedy in the courts of the state and after describing the conditions then existing this court said:

> "Under such circumstances comity yields to constitutional right, and the fact that the procedure on appeal in the legislative fixing of rates has not been concluded will not prevent a Federal Court of equity from suspending the daily confiscation, if it finds the case to justify it."

In *Banton v. Belt Line Railway Corporation*, 268 U. S. 413, it was contended by the appellants that when the suit was commenced the rate-making process was not completed and that the appellee had not exhausted its legal remedies in the state tribunals and on this point the court said:

> "On the point under consideration it must be assumed that the joint fare of five cents was confiscatory, as alleged. The continued enforcement of that rate would operate to take appellee's property without just compensation, and to compel it to suffer daily confiscation. Notwithstanding the matter was pending on rehearing, the appellee had the right to sue in the Federal Court to enjoin the enforcement of the rate. It was not bound to await final action by the commission, and, if the rate was in fact confiscatory, to serve in the meantime without just compensation."

And finally, in *Smith v. Ill. Bell Tel. Co.*, 270 U. S. 587, 70 L. Ed. 440, the claim was made that the company had not exhausted its legislative remedies before bringing the action in the Federal Court. The rate application was still pending before the Commission although no action had been taken for a period of two years. In holding that the action might then be brought in the Federal Court to enjoin the enforcement of the rates then in force, this court said:

"Property may be as effectively taken by long-continued and unreasonable delay in putting an end to confiscatory rates as by an express affirmance of them, and where, in that respect, such a state of facts is disclosed as we have here, the injured public service company is not required indefinitely to await a decision of the rate-making tribunal before applying to a Federal Court for equitable relief."

Chapter 278, Laws of Minnesota for 1921, was approved April 14, 1921. The plaintiff filed its consent and came under the provisions of the law on April 28, 1921. At the time of coming under the provisions of the law the existing franchises of the plaintiff limited it to a five-cent fare, which it was then charging throughout the city. Section 8 of the Act provides:

"The rates which the street railway is authorized to charge and collect under existing franchises shall be and remain the authorized and lawful charge until a rate is fixed by the commission under the provisions of this act."

Section 10 of the act provides for an appeal by either party from the order, ruling or decision of the Commission to the district court and that such appeal shall be taken and proceeding thereunder had as prescribed by Sections 4191-4199, inclusive, of the General Statutes of Minnesota for 1913. Provision is also made in this section for an appeal to the state Supreme Court from the final judgment or order of the district court, which appeal to the Supreme Court is governed by Section 4200 of the General Statutes.

Section 4192, covering proceedings on appeal to the district court, provides:

"Such appeal shall not stay or supersede the order appealed from unless the court, upon an examination of said order, and the return made on said appeal, and after

giving the respondent notice and opportunity to be heard, shall so direct."

Section 4200, covering appeals to the Supreme Court, provides:

"No such appeal shall stay the operation of such order or judgment unless the district or supreme court shall so direct."

The situation of this Company, then, was this: Unless and until a rate was fixed by the Commission under the provisions of Chapter 278, the act itself fixed a rate of fare at five cents. The Commission, by its order, fixed the rate at six cents cash, five tickets for twenty-five cents. The only power that the court would have under the law would be to supersede the rate fixed by the Commission and leave in effect the rate fixed by the legislature in the act itself, of five cents. The law provides no method of any sort by which the court could give any relief from the confiscatory order of the Commission except by superseding it and putting into force a lower and more confiscatory rate.

In view of the decisions of this court which have been referred to, beginning with the *Oklahoma* case in 261 U. S., this court has consistently held to the proposition, so tersely stated in that decision, that rules of comity or convenience must give way to constitutional right and that principle requires a determination in this case that the action in the Federal Court was not premature, whether the proceedings on appeal to the state court, as authorized by the statute, be considered as judicial or as legislative in their nature. We think, however, that they must be considered as judicial under the decisions of the State Supreme Court of Minnesota and of this court.

(b)

The Action was not Premature Because Brought Before Testing the Commission Rate.

The City has raised this point at each stage of this proceeding and each time has been overruled.

The Company was operating under a straight five-cent fare when the law was passed and its experience under that rate was a practical test of the rate fixed by the commission, six cents cash, five tickets for twenty-five cents; a five-cent rate for every one who cared to invest at any one time as much as twenty-five cents.

The Company established by its affidavits before the statutory court of three Judges and by its evidence before the Master that under such a rate more than 90 per cent of the passengers could be expected to ride at the five-cent rate of fare.

In the argument on the issuance of the interlocutory injunction before the three Judges the same cases from this court were used as are now relied upon by the city and cited on pages 40 and 41 of the city's brief, and in response to this argument Judge Sanborn, in delivering the opinion of the three Judges, said:

> "It was suggested here that the rule should be that there should be no relief granted to corporations or individual whose property was being taken unless it was proved beyond doubt. We do not agree with that proposition. We are of the opinion that when it appears with reasonable certainty that for some time in the past and during the present a man or a corporation is being deprived of his property without any compensation,—being confiscated,—whether the amount of the confiscation be all of his property or any substantial part of it, he ought to be relieved of it if it is within the power of the Federal

Court to do it. We are satisfied that this corporation has been deprived during the last six months of a part of its property and that the rate which has been prescribed by the commission of six cents cash and five tickets for twenty-five cents will continue the deprivation until there is a radical change in the business of the company."

The order of the Master was dated December 10, 1923, and the evidence included the operations of the Company under the six cent fare until July 31, 1923 (R 718). The Master found (R 704) that:

"Under the rates and charges established by the Railroad and Warehouse Commission of Minnesota in and by its order of July 13, 1922, the plaintiff could not and will not earn sufficient to meet its operating expenses and taxes and receive a net return of 7½ per cent on the *fair* value of its property as it was on December 31, 1921, and that the enforcement of said order would therefore deprive plaintiff of its property without just compensation; that to earn such return the plaintiff must be permitted to charge and collect six cents for each passenger carried by it in the city of Duluth."

In the final decree, from which this appeal is taken, (R. 733) it is determined:

"That the order of the Railroad and Warehouse Commission of the State of Minnesota dated July 13, 1922, establishing rates and fares to be charged and collected by the plaintiff for the transportation of passengers on its street cars in the city of Duluth from and after the first day of August, 1922, would, if enforced, deprive the plaintiff of its property without due process of law and deny to the plaintiff the equal protection of the law and take from the plaintiff its property without compensation, and said order was and is contrary to the provisions of the constitution of the United States.

This record, we think, demonstrates that the decree
joining the enforcement of the Commission's order was rig
and should be affirmed. The Company's experience for
year under a six-cent fare and its former experience under
five-cent fare furnished all the test necessary. There was
necessity for any test period of the Commission's rate. T
test, wherever required, has only been to furnish the nec
sary evidence as to the effect of the proposed rate. There
no necessity for such test if without evidence, satisfactory
the court, can be produced establishing the invalidity of t
rate. This is conclusively established by the cases from th
court cited by the city.

In the *Knoxville* case, the court said (italics ours):

> "If a company of this kind chooses to decline to
> serve an ordinance of this nature and prefers rather
> go into court with the claim that the ordinance is unco
> stitutional it must be prepared to show to the *satisfacti*
> *of the court* that the ordinance would necessarily be
> confiscatory in its effect as to violate the constitution
> the United States,"

and after quoting from other cases the court continued:

> "*It cannot be doubted that* in a clear case of confis
> tion it is the right and duty of the court to annul the law

In the *Knoxville* case, the trial court declined to recei
evidence as to operations after the ordinance was adopted a
the action started. This was held error and the court said:

> "But evidence of the operations of the years succe
> ing to the ordinance is relevant and of great importan

and by a consideration of such evidence a much greater degree of certainty could be obtained."

In this case the trial court had the benefit of that evidence in the result of one full year of operations after the effective date of the Commission's order.

In the *Wilcox* case, cited by the city, which involved the gas rates of New York, the court, while holding that the evidence did not warrant injunction, said:

"Of course there may be cases where the rate is so low, upon any reasonable basis of valuation, that there can be no just doubt as to its confiscatory nature, and in that event there should be no hesitation in so deciding and in enjoining its enforcement without waiting for the damage which must inevitably accompany the operation of the business under the objectionable rate."

In *City of Louisville v. Louisville Home Telephone Co.*, 279 Fed. 949, the court, among other things, said:

"It is said that, before an injunction issues suspending a legislatively fixed rate, there should be a trial period. This has often been thought a proper preliminary step (citing cases) though we think the conclusion has always been a discretionary one upon the facts of the particular case, and that there has never been any hard and fast rule to that effect. In any event, the present situation is not closely analogous to those in which the trial period has been required. In the railroad cases, as well as in the gas and water cases, the challenged law had reduced the existing rate. This would inevitably tend to increase the number of customers and to diminish the applicable overhead. There was plausible insistence that the net result would be, or might be, a gain and not a loss. In the present case, and in a very fair sense, there had

> been a trial period. For the year 1920, the last year of the franchise rates, the gross receipts and the operating expense and the net income were known. The company claimed that it received no substantial return upon its investment. The city did not deny that the company was entitled to an increase in rates. The temporary ordinance, which was rejected by the company as insufficient, and which is now under attack, increased the rates between 20 per cent and 25 per cent above the old ordinance. It is not to be doubted that the tendency of this increase, considered alone, would be to lessen the number of customers, and thereby diminish the gross receipts and increase the distributed overhead. The main reason for requiring a trial period thus seems to be absent."

In the *Prendergast* case, 262 U. S. 43, there was no test of the rates which were enjoined.

In the *Knoxville* case, the court said that the requirement in the absence of a test was to show to the *"satisfaction"* of the court that the ordinance would necessarily be confiscatory and in this case Judge Sanborn, speaking for the court of three judges granting the interlocutory injunction, said:

> "We are satisfied" that confiscation has been going on and under the Commission's order would continue.

The Master, with an experience under the somewhat higher rate for one full year, decided that the order was confiscatory and the trial court upon the same evidence approved the Master's report and made the same finding.

The Company had been operating for years under the straight five-cent fare. The order of the Commission, which continued the five-cent fare for everybody who was willing to pay for five rides at one time and only allowed one cent additional for the casual rider who would only pay for one ride

at a time, was such a slight advance that the experience of the Company for the years preceding was for all practical purposes a test of what would be received under the Commission rate, and under all the circumstances we submit no other test was necessary or required, and a test of the Commission's rate would, as Judge Sanborn said, have only resulted in still further depriving the company of its property.

IV.

Valuation.

The City complains of the valuation established by the decision of the trial court in only two respects (a) as to the items concerning cost of financing and (b) as to the amount added to the pre-war cost to reflect the then present day prices. Otherwise the City makes no claim but that the values placed upon the component parts of plaintiff's property were proper.

(a) *Cost of Financing was properly allowed.*

The Master found and reported that "the original financing cost was $89,075.00" and included that amount in the value. The trial court approved this.

The cost of financing is always present in the marketing of any security.

By cost of financing we mean that element of cost or expense which is incurred in securing moneys to finance the property.

In the case of *Ben Avon Borough v. Ohio Valley Water Co.*, 271 Pa. 346. The Supreme Court of Pennsylvania said:

"The last question is whether or not brokerage on

the sale of the bonds of the water company should have been allowed. The Commission says that sufficient evidence of actual payment thereof was not produced, but everybody knows that expenses are necessarily incurred in such sales; even our Victory and Liberty Bonds could not be marketed except at a very heavy cost. There is no legal principle standing in the way of making proper allowance therefor, and it is difficult to understand the basis of the mistake of those who hold it should not be allowed. The matter is in the same situation as if appellee had placed its bonds in the hands of an agent, with direction to sell them and apply the proceeds as needed, for construction expenses. These bonds were all that the water company had to apply in payment of the plant, and the use thereof for this purpose, in the final analysis, constituted simply an exchange of one for the other. If it had been remembered that money itself has no value except that given to it by reason of the fact that other commodities can be obtained in exchange for it, the error of refusing to allow this as a principle expense would probably not have been made."

In *Galveston Elec. Co. v. Galveston*, 258 U. S. 388, this court refused to allow an item of cost of financing to be included in the rate base, not by reason of the fact that cost of financing is not proper to be considered but by reason of the fact that there was no proof adduced that the company had incurred a cost or expense in connection therewith. The court said:

"The other item included by the Master in determining base value, but disallowed by the court, is $67,078 for brokerage fees. There is no evidence that any sum was in fact paid as brokerage."

In *City of Winona v. Wisconsin-Minnesota Light & Power Co.*, 276 Fed. 996, 1004, the court said:

"I have eliminated entirely the item of cost of financ-

ing. Not but what such an item is proper in cases where the evidence shows such expense was incurred, but I have been unable to find any such evidence in the present record."

The City, on page 62 of its brief, said:

"Apparently the Master in the present case distinguished the above cited authorities on the ground that it did not specifically appear in evidence in the cited cases *that the sums claimed were* in fact paid by the company; whereas in the present case it did appear that $89,075 had been paid as cost of financing through bond discounts or otherwise."

The Master found that the original cost of financing was $89,075, and in his report said:

"What has been said with reference to overheads applies equally to cost of financing. There is to be no refinancing of the property at this time, but it appeared from the evidence that the original financing cost was $89,075 and that amount has been included."

The trial court, in the decision appealed from here, said:

"The Master has included one item which does not appear separately in the Commission's table, viz.; cost of financing. In my opinion this is an item which should only be included, provided the evidence shows that it had an actual as distinguished from a theoretical existence. The Master so found, and I think his finding is supported by the evidence, and that the amount allowed by him, $89,075, should be approved." (See 4 Fed. 2nd, p. 549).

The City does not claim but what the Company did actually expend this sum of $89,075 in connection with the marketing of its securities. It was an actual expense incurred, carried on the Company's books as such. The City's complaint is that even though the expense was incurred, it should not be allowed. We do not understand this to be the rule but we understand the rule to be as recognized in the *Ben Avon* case, supra.

This decision of the Supreme Court of Pennsylvania was followed by the Pennsylvania Public Service Commission in the case of *Borough of Wyoming v. Luzerne County Gas and Electric Co.*, P. U. R. 1922 A, at page 59, the Commission stating:

> "The complainants and respondent both contend that bond discount should not be capitalized and that provision should be made for its amortization during the life of the bonds, the respondent claiming that the necessary amount be considered as an item of operating expense and the complainants that it should be considered as a deduction from income. The law has now been settled by the recent decision of the supreme court in Ben Avon Borough et al. v. Ohio Valley Water Co., 271 Pa. 346, decided July 1, 1921, wherein it was held that bond discount is to be considered by the Commission as an element entering into the determination of fair value."

The Utah Commission in *Utah Light & Traction Company*, 1920 B, 262, held that the cost of acquiring money, which covers the cost of selling or marketing securities for the permanent financing of utility property, is a reasonable charge entering into the cost of the property and should be allowed in valuation proceedings, except where the charge has been amortized or has been recouped from earnings. The Commission at page 279 said:

"This item covers the cost of selling or marketing securities for the permanent financing of the property. This is usually done through regular organizations engaged in the business of selling securities. This cost of marketing must not be confused with bond discount or discount on notes. The cost will vary with every property, according to conditions, the rate of interest which the security carries, the attractiveness of the enterprise itself, standing of the originators of the enterprise, the security of the earnings, etc. It is a reasonable charge entering into the cost of the property, and should be allowed in valuation proceedings, except in cases where this charge has been amortized, or has been recouped from earnings. Testimony before this Commission is to the effect that no amortization fund has been set up to take care of this expense. An allowance has, therefore, been made in the final summary."

The Utah Commission followed this rule in *Power & Light Company*, P. U. R. 1922A, 436, at 447, where it is said:

"Costs of selling or marketing securities for the permanent financing of the property, is usually done through regular organizations engaged in the business of selling securities. This cost of marketing must not be confused with bond discount or discount on notes. It is a reasonable charge entering into the cost of the property, and should be allowed in valuation proceedings, except in cases where this charge has been amortized or has been recouped from earnings."

(b) *Amount added to reflect present day prices was not too high.*

The latest decision bearing upon this question by a court of last resort, to which our attention has been called, is that of *Waukesha Gas & Electric Company v. Railroad Commission of Wisconsin*, decided in January, 1927. This decision re-

verses the judgment of the lower court and vacates the order of the Railroad Commission as confiscatory because the Commission did not, in determining the value, give sufficient weight to the present reproduction cost. The decision is based largely upon the *Indianapolis Water Company*, 47 Sup. Ct. Rep. 144. In the course of its decision the Supreme Court of Wisconsin says:

> "A valuation which does not as to the tangible property substantially reflect the then cost of reproduction less depreciation does not meet the requirements. The utility is entitled to the present fair value of its property as a basis for rate making. * * * Since the basic result to be reached is the present and near future fair value of the property any method that will accomplish that result is a proper method. It is doubtful if any method will accomplish such result unless it substantially reflects or agrees with present or recent reproduction cost less depreciation."

In the proceedings before the Commission and again before the Master the evidence showed that the representatives of the City and of the Company had agreed upon the inventory of the physical property of the Company and agreed upon the cost of reproduction of the physical property of the Company as it existed on July 1, 1921, except land, on four different bases, as follows:

1. Upon the cost of reproduction based upon 1915 prices.

2. Upon the cost of reproduction based upon the average of prices for ten years ending July 1, 1921.

3. Upon the cost of reproduction based on July 1, 1921 prices.

4. Upon the cost of reproduction based upon units used

in the actual construction of the property or an investment basis.

The results of applying the agreed inventory of the physical property of the Company as of July 1, 1921, except land, to the agreed unit prices on these different bases was as follows:

Basis No. 1, 1915 prices	$3,488,161.00
Basis No. 2, ten year average	4,864,437.00
Basis No. 3, July 1, 1921 prices	6,308,966.00
Basis No. 4, Investment basis	3,487,020.00

It will be noticed that the reproduction or investment basis applied to this inventory produced a result of $1,141 lower than that obtained by using 1915 prices. The result obtained by using the ten-year average was approximately 140% of the investment basis, and by using the July 1, 1921 prices was approximately 180% of the investment basis. (Rec. Page 20).

The City employed as its expert engineer on the question of valuation Mr. Byron T. Gifford, and the Company employed A. L. Drum & Company. The result of their investigations was submitted in comprehensive statements, both to the Commission and to the Master. They agreed on the inventory of the physical property and as to the unit costs for reproduction of the physical property, except the land, upon the four bases that have been mentioned. They did not agree upon the intangible elements considered in their reports in connection with value. Complainant's exhibit 32, which was introduced both before the Commission and before the Master, is a tabulation of the reports of the two engineers upon the four bases above described. The initials A. L. D. represent A. L. Drum & Company, the Company's expert engineer, and the initials B. T. G. represent Byron T. Gifford, the City's expert engi-

neer, and the reproduction cost as shown in this table is of the property undepreciated. For the convenience of the court, a copy of this exhibit is printed as an exhibit to this brief.

There was little difference of opinion between the engineers for the City and the Company as to the amount of the accrued depreciation. The Commission found upon the evidence submitted, including the reports of their own engineer, an accrued depreciation of 17% and this finding was approved by both the Master and the trial court.

The Commission found (Rec. P. 27) the value of physical property undepreciated, excluding land, as of July 1, 1921, $3,940,000.00. The agreed reproduction cost of the same property on the investment basis, which was $1,141 less than the 1915 basis, was $3,487,020. To give effect to the increased prices, the Commission added to the investment basis, which was less than the pre-war basis, $452,980.00, which was 12.99+%, and this was the only recognition which the Commission made of the increased prices, which according to the unit prices agreed upon by the City and the Company was for the ten-year average ending July 1, 1921 approximately 40%, and for the prices prevailing July 1, 1921, approximately 80%. The trial court, as pointed out in the City's brief, deducted that portion of the property of the Company that had been acquired during the period affected by higher prices, and added to the investment basis for the balance of the property 40%.

The Company contended before the Commission and before the Master and the trial court for a much higher valuation, and we still think that the valuation found by the court was too low, but we have taken no cross appeal, and the only question before the court now is whether the decree of the court below, enjoining the Commission's order as confiscatory, was right.

The decision of the trial court was made before some of the later decisions of this court, in which this court has more

clearly stated the effect that should be given to higher prices prevailing since the war. The trial court, in adding 40% to the reproduction cost of the property acquired before prices were affected by the war, determined on the investment or pre-war basis, in effect adopted as to such property the average prices for the ten years ending July 1, 1921, as shown in the Basis No. 2. This was the basis, as we understand, that was adopted by the Commission in the *Indianapolis Water Company* case, recently decided by this court. In that case the court said:

> "The price level adopted by the Commission for the average for ten years ending with 1921 was too low,"

and further said:

> "We may take judicial notice of the fact that there has been no substantial general decline in the prices of labor and material since that time (1923). The trend has been upward rather than downward."

The value established was as of December 31, 1921, at which time the price of commodities affecting the cost of street railway property was more than 50% above pre-war prices, and the undisputed testimony is to the effect that at the time of the hearing the increase in price of commodities affecting the cost of the property of complainant was 55.8% over pre-war prices; as of December, 1922, an increase over pre-war prices of 59½%; as of April, 1922, an increase over pre-war prices of 55.7%; and that the range of prices affecting component parts of the property from and after December 31, 1921, to and including the time of the hearing, was between 55.7% and 59½% above pre-war prices. (Rec. p. 251).

It was agreed by all parties and found by the Commission,

the Master and the trial court that the cost inventory of items of physical property, excluding the land, on the investment basis, was $3,487,020, and other items not inventoried amounting to $6,385.00, making a total of $3,493,405. (4 Fed. 2nd, p. 548). The trial court found that $2,830,189 represented the amount of the pre-war items, which was increased by 40% to reflect present day prices. As to the balance of the inventoried property, nothing was added.

The method by which the trial court arrived at valuation is set forth in full, with accompanying tables, in 4 Fed. 2nd, p. 543. We quote, however, only the following:

> "It is my opinion, therefore, based upon the evidence, and in view of the decisions of the courts, that sufficient consideration was not given to the increase in prices in the past few years.
>
> "In the Rand case (C. C. A.) 285 Fed. 818, the Master, under somewhat similar circumstances, used a 25 per cent increment over pre-war prices, to arrive at the then present prices. The Circuit Court of Appeals said this was insufficient and used a 50 per cent increment. The value in the Rand case was made as of January 1, 1920; in the present case, as of December 31, 1921. But the Circuit Court of Appeals, speaking as of January 8, 1923, used the following language:
>
> 'We are authorized to take notice that no marked *recession* of prices has taken place since the time this case was heard by the Master and that there is no present appearance of an assured reduction.'
>
> "Since that time there have been, in my judgment indications of a reduction in general prices to some extent; but I think in the instant case at least a 40 per cent increase should have been used on that part of the inventory basis figures which represented pre-war items. This, the evidence fairly shows, was $2,830,189. The modified figures would thus appear as follows:

Undepreciated value inventory items, less land, investment basis	$3,487,020.00
Add outside of inventory	6,385.00
Total	$3,493,405.00
Add 40% on $2,830,189	1,132,075.00
Total	$4,625,480.00
Depreciation 17%	786,331.00
Depreciated value	$3,839,149.00

The table of agreed upon bases of valuation above given is ample evidence to sustain this modification."

The City claims that the 40% increase should not have been added.

The City's claim in this regard is not based on any arguments that the addition is not justified by the evidence in this case. In truth, the evidence would support a valuation on the physical property, exclusive of land as of July 1, 1921 of 80% above pre-war prices.

The summary of all of the items entering into the valuation as found by the trial court is set forth in 4 Fed. 2nd, p. 549, as follows:

"Undepreciated cost of physical property items, excluding land	$3,493,405.00
Add 40% on $2,830,189.00	1,132,075.00
Depreciation 17%	786,331.00
Depreciated value	$3,839,149.00
Overheads	369,534.00
Land	128,474.00
Working capital, materials and supplies	135,000.00
Cost of financing	89,075.00
Going value	350,000.00
Power contract	91,300.00
Additions between July, 1921 and December 1921	6,978.00
Total	$5,009,510.00

As previously stated, the City complains concerning but two items—first, the cost of financing, and second, the amount added to reflect present day prices. As to the cost of financing, the expense was incurred. As to the 40% added to reflect present day prices, this was too low under the undisputed evidence and under the *Indianapolis Water Company* case. The value as established by the court was lower than that to which the Company was entitled.

V.

Operating Expenses.

The Commission found the operating expenses, based upon the year 1921, to be $1,111,726.84, which included state taxes but not federal income tax. The Master, basing his figures upon the year ending July 31, 1923, after making some minor changes, deducted $38,8[illegible]3.83 from the Company's estimate of Operating Expenses, added the estimated amount of the federal income tax, under the authority of *Georgia Railway & Power Co. v. R. R. Comm.*, 262 U. S. 625, and found the amount of Operating Expense to be $1,191,024.39. (Rec. p. 721)

The trial court approved the operating expenses as found by the Master (4 Fed. 2nd, 550).

The Commission does not discuss the matter of Operating Expenses in its brief. The City objects to certain items of Operating Expenses, as found by the Master, and approved by the court. These items and our answer to the City's objections follow:

A. *Depreciation.*

On pages 86 to 91 of the City's brief the question is

raised as to the propriety of the item allowed by the Commission, the Master and trial court for annual depreciation, the amount $115,000 being computed by the Commission on a basis of 2½% upon the undepreciated value of the depreciable property.

The City does not question the rate of 2½%, statement being made on page 91 of the City's brief, "no contest should be made over the percentage allowed for annual depreciation stated at 2½%."

The claim, however, is made by the City that depreciation was allowed upon undepreciable property. (See City's brief, page 87). In this the City is in error. The Commission based its depreciation upon the value which it found of the depreciable property undepreciated. This method was clearly right and was approved by both the Master and the trial court. The City's error consisted in overlooking this fact and assuming that the Commission was basing its percentage of depreciation upon the depreciated value of the property.

The Commission found the undepreciated value of the depreciable property to be $4,600,000, made up of the following items:

Physical property undepreciated, excluding land,	$3,940,000.00
General overheads	550,000.00
Power Contract	110,000.00

The Commission then depreciated this value by 17%, arriving at the value of the depreciable property depreciated $3,818,000, and then to find the rate base, the Commission added the value of the following items as found by the Commission:

Lands	$ 140,000.00
Working capital, material and supplies	135.000.00
Going concern value	500,000.00
Total	$4,593,000.00

(Record P. 27)

Therefore, according to the Commission's figures, the total depreciated value as of July 1, 1921, of all classes of property, both depreciable and undepreciable, was found to be $4,593,000, while the undepreciated value of the depreciable property was $4,600,000. The two figures are only $7,000 apart. This may have misled the City. After determining the value of the depreciable property, the Commission then determined "that the amount to be included in operating expenses for depreciation can be somewhat reduced and has adopted a figure of 2½% to be applied upon the *depreciable* property, which produces a figure of $115,000.00" (Record p. 28).

The Master thoroughly understood that the Commission, in computing the amount of depreciation, used only the undepreciated value of the depreciable property as a base and in his report said:

> "The Commission found 2½% upon depreciable property a reasonable allowance and computing this upon the physical property, excluding land, undepreciated, and including general overheads, power contract, a total of $4,600,000, allowed depreciation at $115,000." (Record p. 719).

The trial court found the undepreciated value of the physical property, excluding land, to be $4,625,480. (4 Fed. 2nd 548) The Master found the value of overheads to be $369,534, (Record p. 719), and the trial court approved this finding. (4 Fed. 2nd, 549)

The trial court said:

> "The item of annual depreciation of $115,000 cannot be considered excessive in view of the modified valuation above given." (4 Fed. 2nd 550).

B. *Increased Service.*

The City claims that the operating expenses of the Company were increased by the amount of $42,158.69 by reason of increased service furnished by the company upon the West Third Street Line, without approval of the City having first been obtained to such increased service.

During the twelve-month test period, there was some increase of service in the City of Duluth.

The number of car miles operated in the year 1921 was 3,283,232 and in the twelve-month test period was 3,546,439, being a difference of 263,207 of which 10,000 miles was, by reason of additional service on the Park Point line ordered by the City Council, leaving 253,207 additional car miles operated in other parts of the City (Rec. p. 668-669).

The additional car miles operated in other parts of the City increased the Company's operating expenses by approximately $42,158.69, being the variable expense which was computed by engineers for the City, the Commission and the Company on the basis of 16.65 cents per car mile (Rec. pp. 668-669).

Practically, if not all, of this increased service was upon what is known as the West Third Street Lines. Mr. Warren testified that prior to furnishing the extra service on November 27, 1922, there had been carried on the West Third Street Lines from 44½ to 39 passengers per one-way trip on the ten minute base schedule headway during the noon-rush hours, and there had been carried on the portion of the West Third Street Line affected by the increased extra service the following average number of passengers daily by quarters:

July, 1921	19,891
October, 1921	18,493
January, 1922	18,974
April, 1922	19,548
July, 1922	18,952

About this time, October and November, 1922, jitneys began to run upon West Third Street and for the October quarter, 1922, the daily number of passengers dropped to 16,380. Commencing November 27th extra trips were run during the non-rush hours and the daily average for the quarter ending January, 1923, had increased to 19,834, and

April, 1923	20,222
July, 1923	18,138

which shows clearly that the additional service secured additional passengers (Rec. p. 692).

At the time the decrease was noted in the number of passengers carried on the West Third Street Lines there was no corresponding decrease in other parts of the city and when the increase was noted after putting on the extra service there was no corresponding increase noted in other parts of the city. (Rec. p. 692).

The decrease as noted in October, 1922, was equivalent to 11.4% in that section of the city, while throughout the city as a whole the decrease was but 5.8% and for the quarter ending January, 1923, the increase on the West Third Street Line was 21.1%, while the increase in the city as a whole over the previous quarter amounted to 12.8% (Rec. pp. 693-694).

In July, 1921, 44.5 passengers were being carried for half trips on the West Third Street Lines affected by the subsequent increase in service, while the highest number in any other section of the city was 37.4 passengers per half trip (Rec. p. 613).

In October, 1921, the average on the West Third Street Lines per half trip was 41.1 passengers, while the highest in any other portion of the city was 33.6. After the increase in service the average passengers carried was 32½ per half trip, compared to other lines in the city carrying 35, 34, 33,

32, 27, 26, 23 and lower figures for some other lines (Rec. p. 613).

From the foregoing it would seem that compared with the rest of the city the West Third Street district, until the time the service was increased, was not being as fairly treated as the remaining portions of the city.

By way of added revenue, the Company received more than the cost of this increased service. In other words, from a managing standpoint, the increased service was justified (Rec. p. 696)). Whatever increase there was in the operating expenses by reason of the increased service, the same was more than made up by the increased revenue derived therefrom (Rec. p. 696).

The Master also took the view that the increased service was justified and that the service paid for itself, the Master's report stating:

> "During the last eight months of the year ending July 31, 1923 the plaintiff, without asking or receiving authority from the city, increased the number of cars upon one or more of its lines, increasing the car miles operated by approximately 252,207, and at an increased operating expense of approximately $42,158.69. No evidence was produced to indicate that this additional expense was not incurred in good faith, nor was there any definite showing as to what effect it had upon the revenues of the Company, although Mr. Warren, the General Manager of the Company, testified that he believed the service paid for itself.
>
> "The definite schedule approved by the City Council should be construed as the minimum service required and in the absence of a strong showing either that the additional service was wholly unnecessary and ill advised, or that it was not furnished in good faith, the expense of such service should not be deducted from operating expenses and the claim for such reduction is disallowed." (Rec. p. 719).

C. *Attorneys' Fees.*

The Company paid and charged into Operating Expenses attorneys' fees in amount of $15,000 in connection with the present case before the Commission and court. The Master allowed this item as an operating cost, amortizing it over a period of five years, and included in the operating expenses $3,000 for one year. The City maintains that this is not a proper charge, and that the operating expenses should be reduced by this amount. (City's brief, pp. 95-96).

The trial court held that the law under which the Company is operating (Chapter 278, General Laws Minnesota, 1921) contemplated that the expense of rate litigation should be charged into operating expenses and so considered. The City objects to charging attorneys' fees paid in Federal Court litigation to Operating Expenses, on the ground that to do so would encourage resort to the Federal Court. Resorting to the Federal Court is but the exercise of a right guaranteed by the federal constitution. The fee was paid. The Company was and still is trying to save its property and the expense of so doing was legitimate and a proper charge when amortized to operating expense.

D. *Expenses Connected with Rate Proceeding.*

The City complains that there was allowed in operating expenses a sum of $11,415.24, being expenses paid in connection with the rate proceeding before the Commission, and the sum of $1,060, being amount paid by the Company to the Commission for part of the Commission's expenses in connection with the proceedings before the Commission.

There is included in the sum of $11,415.24 the amount paid by the Company to the City for the City's disbursements in connection with the rate proceeding before the Commission.

That the expenses incurred in the rate proceeding before the Commission should be charged into operating costs and considered in determining what operating costs are, is provided for in Chapter 278, General Laws of Minnesota, 1921, the last paragraph of Section 9 of the Statute reading as follows:

> "All the expenses and disbursements of the city in any such proceeding, either before the Commission or court on appeal shall be borne by the street railway company as an operating expense, and shall be paid by the street railway to the city upon presentation to the street railway of vouchers showing that the same has been paid or incurred by the city; provided the amount of expenses and disbursements to be so paid shall not exceed in any one year an amount equal to One Hundred and Fifty Dollars per one thousand of population of any such city and the necessary expense incurred by the Commission in such proceedings shall also be paid by the street railway company and treated as an operating expense."

The City's population was more than 100,000, so that these expenses up to more than $15,000 are specifically provided for as a part of the Company's operating expenses. We see no basis for the City's contention that these two items are not proper operating expenses. They were paid by the Company and the law directs that they shall be charged to operating expenses. The best reason why it was proper to so charge them is that the law so directs.

E. *Snow and Ice.*

The City complains that the item of expense incurred of $9,341, for the removal of snow and ice, was excessive in amount of $4,341. (City's brief, pp. 100-101).

The expenses for the twelve month period ending July 31, 1923 was taken as the period upon which to compute operating expenses (Rec. p. 718). It is a matter of common knowledge that the operating expenses on various items fluctuate. The expenses of removal of snow and ice will be higher than the average in one year, while the expenses for other items may be lower. The item of cleaning and sanding track might be higher than the average. The item of track and roadway labor might be higher than the average. The item of heating cars might be higher than the average. No claim is made by the City that the operating expenses considered as a whole do not fairly represent the average experience of the Company over a period of years. The City attempts only to pick out this one item and say that it is higher than the average over a period of five years. The amount was actually expended. Relative to snow and ice, the experience of the Company over the past seven years immediately prior to the hearing was that the average actual expenditures for that item had been $7,097.01 per year. The tendency for the amount expended in connection with the removal of snow and ice is to increase as the business section of the city enlarges and the removal of snow covers greater territory. The manager of the Company does not believe that th amount expended for removal of snow and ice will run under $8,000 or $9,000 in future years. (Rec. p. 689).

The Master, relative to charges for removal of snow and ice, and for expenditures for bridges, trestles and culverts, stated:

> "No deduction is made because of the last two items. It is not claimed that the amounts were not actually expended and to reduce them because of comparison with other years or an average of other years seems too conjectural." (Rec. p. 720).

F. *Bridges and Culverts.*

The City also contends that the amount expended on bridges and culverts is excessive in amount of $2,203.92.

No claim is made but what this amount was actually expended by the Company. This item falls in the same category as the item for removal of snow and ice. The twelve month period used as a test period in which to determine operating expenses was a fair period, and while expenses on one particular account may be higher than the average over a period of few years, the expenses on other items might be lower. Operating expenses fluctuate and do not remain at any fixed level.

The City, on page 102 of its brief, summarizes its claim that operating expenses should be decreased in amount of $92,003.35 and this is made up of the claims hereinbefore set forth under headings A to F inclusive. In answer to the City's contentions, we say:

Depreciation was computed on the basis of 2½% on the undepreciated value of the depreciable property. This was proper.

The increased expenses, due to increased service on the West Third Street Line, was more than off-set by increased revenue.

The attorneys' fees paid in connection with the Federal Court litigation was a proper allowance in connection with operating expenses.

The expenses incurred in proceedings before the Commission in connection with rate matters and expenses of the Commission in connection therewith, paid by the Company, are proper items of operating expenses and are directed by statute to be charged into operating expenses.

highly profitable enterprises or speculative ventures. Th return should be reasonably sufficient to assure confi dence in the financial soundness of the utility, and shoul be adequate, under efficient and economical managemen to maintain and support its credit and enable it to rais the money necessary for the proper discharge of its pub lic duties. A rate of return may be reasonable at on time, and become too high or too low by changes affect ing opportunities for investment, the money market, an business conditions generally."

In the *Indianapolis Water Co.* case, recently decided, thi court said:

"It is obvious that rates of yield on investments i bonds plus brokerage is substantially less than the rat of return required to constitute just compensation for th use of properties in the public service. Bonds rarely cor stitute the source of all the money required to financ public utilities. And investors insist on higher yield on stock than current rates of interest on bonds.

"Obviously, the cost of money to finance the whol enterprise is not measured by interest rates plus brok erage on bonds floated for only a part of the investmen The evidence is more than sufficient to sustain the rat of 7% found by the commission. And recent decision support a higher rate of return." Citing a large numbe of cases.

In the case at bar the Commission, the Master and th trial court have all agreed upon the rate of 7½% as bein reasonable. The Commission is not now contending tha the rate of 7½% was too high. The Company contended be fore the Commission and before the court that the rate shoul be not less than 8% and its evidence fully justified this rat

In addition to the cases cited by this court in the *India apolis Water Company* case, we refer to the following dec

sions of commissions and courts made in the year 1922, all of which have given a rate of return of 8% or more. No attempt has been made to make this list exhaustive but only to make it illustrative:

Re: *City of Flint* (*Mich.*) P. U. R. 1922 A, 385 ..... 8%
Re: *Franklin Light & Power Co.*, (N. H.) P. U. R. 1922A, 506 ..... 9½%
Re: *Utica Gas & Elec. Co.* (*N. Y.*) P. U. R. 1922 A, 147 ..... 9½%
Re: *Tuscon Gas Elec. Light & Power Co.* (Ariz.) P. U. R. 1922 C, 658 ..... 9%
Barth v. Hughes & D. Elec. Co. (*N. D.*) P. U. R. 1922 A, 740 ..... 8%
Re: *San Joaquin Light & Power Co.* (*Cal.*) P. U. R. 1922 D, 595 ..... 8.29%
Libby v. Libby Water & Elec. Co. (*Mont.*) P. U. R. 1922 E, 402 ..... 8%
Re: *Plymouth Elec. Light Co.* (*N. H.*) P. U. R. 1922 B, 467 ..... 8%
Re: *Page Lighting Plant*, (*N. D.*) P.U. R. 1922 A, 652 ..... 8%
Re: *Rose Milling Company*, P. U. R. 1922 A, 587 ..... 8%
Re: *Oconto Service Co.*, P. U. R. 1922 E, 130 ..... 8%
Re: *Rio Electric Co.*, (*Wis.*) P. U. R. 1922 E, 764 ..... 8%
Re: *Los Angeles Gas & E. Corp.* (*Cal.*) P. U. R. 1922 A, 283 ..... 9%
Stamford v. Stamford Gas & E. Co., P. U. R. 1922 A, 303 ..... 8%
Re: *Lansing Fuel & Gas Co.*, P. U. R. 1922 B, 605 ..... 8%
Re: *Eaton Rapids* (*Mich.*) P. U. R. 1922 D, 94 ..... 8%
Re: *Webb City & Carterville Gas Co.* (*Mo.*) P. U. R. 1922 C, 608 ..... 8%
Re: *Lynchburg Traction & Light Co.* (*Va.*) P. U. R. 1922 B, 737 ..... 9%

LaCrosse v. Wisconsin-Minnesota Light & P. Co., P. U. R. 1922 B, 113 ..... 8%
Green Bay v. Wisconsin Public Service Co., P. U. R. 1922 B, 671 ..... 8%
Re: Wisconsin Gas & Elec. Co., (Wis.) P. U. R. 1922 C, 829 ..... 8%
Re: Wisconsin Minnesota Light & Power Co., P. U. R. 1922 D, 131 ..... 8%
Winona v. Wisconsin Minnesota Light & P. Co., 276 Fed. 996 ..... 8%

VII.

Income Required and Estimated Revenue.

The trial court found the value of the property as of December 31, 1921 $5,009,510 and found that the Company was entitled to an annual rate of return of 7½% upon its value, amounting to $375,713.25. The Master found annual operating expenses of $1,191,024. This amount was approved by the trial court. The evidence showed revenue other than from passengers of $15,202. Tabulating these figures, we have:

Rate base	$5,009,510.00
Return at 7½%	373,713.25
Operating Expenses	1,191,024.00
Gross Revenue required	$1,566,737.25
Revenue other than passenger	15,202.00
Passenger revenue required	$1,551,535.25

The Commission found that it was necessary to make an increase of rate of fare that would produce approximately $95,000.00 (Rec. p. 26). The Commission assumed 27,030,000

passengers would be carried annually. To produce an increase of $95,000.00 in revenue with 27,030,000 passengers would require an increase in the rate of fare of a little more than one-third of a cent for each passenger. One-third of a cent would produce $90,100.00 and therefore the Commission assumed that more than one-third of the passengers would pay the cash rate of six cents.

The evidence of the Company showed that in the City of Columbus, Ohio, the identical rate fixed by the Commission in its order was in effect. That for the year 1921 the cash passengers on the same rate of six cents cash and five tickets for twenty-five cents was 6.62% of the total number of passengers and the average rate of fare 5.04 cents. That for the year 1922, under the same rate schedule, the ticket passengers were 92.16%, leaving for cash but 7.84% and that the average cash paid per passenger was 5.08 cents. That for six months of 1923 the percentage of cash passengers was 7.11% of the whole and the average cash per passenger was 5.07 cents.

To produce the passenger revenue required, of $1,551,535.25, at the rate assumed by the Commission of 5 1/3 cents per passenger would have required 29,000,000 plus of passengers; at the rate of 5.08 cents, the highest rate shown by the experience of the Columbus company, to produce the revenue required would have taken 30,500,000 plus, but the actual number of passengers carried during the first year after the Commission's order was 25,384,100 or approximately 4,000,000 fewer than necessary, even on the Commission's estimate of the number of passengers that would have paid the cash fare, and more than 5,000,000 fewer than would have been necessary if this company had had the same experience as to the percentage of cash paying passengers that was had by the Columbus company.

VIII.

Conclusion.

We think that we have demonstrated that the court had jurisdiction, that the action was not premature, that the value found by the court was too low, that the rate of return fixed by the Commission and approved by the Master and the Court was not too high, operating expenses as found by the Master and approved by the court were entirely supported by the evidence, and that the rate of fare of six cents cash and five rides for twenty-five cents was entirely insufficient and if put into effect would have resulted in confiscating the Company's property.

We think the decree was right and should be affirmed.

Respectfully submitted,

OSCAR MITCHELL
W. D. BAILEY
H. A. CARMICHAEL
Solicitors for Appellee,
1200 Alworth Building,
Duluth, Minnesota.

COMPLAINANT'S EXHIBIT 32.

THE DULUTH STREET RAILWAY COMPANY—DULUTH DIVISION
COMPARISON OF COST OF REPRODUCTION NEW AS ESTIMATED
BY A. L. DRUM & COMPANY AND BYRON T. GIFFORD.

	——Basis No. 1——		——Basis No. 2——		——Basis No. 3——		——Basis No. 4——	
	A. L. D.	B. T. G.	A. L. D.	B. T. G.	A. L. D.	B. T. G.	A. L. D.	B. T. G.
Inventoried property (excluding land and material and supplies)	$3,488,161	$3,488,161	$4,864,437	$4,864,437	$6,308,966	$6,308,966	$3,487,020	$3,487,020
Land	150,735	118,094	150,735	118,094	150,735	118,094	150,735	118,094
Material and supplies	105,787	105,787	105,787	105,787	105,787	105,787	105,787	105,787
Total inventoried property	$3,744,683	$3,712,042	$5,120,959	$5,088,318	$6,565,488	$6,532,847	$3,743,542	$3,710,901
Expenditures not apparent	6,385		6,385		6,385		6,385	
Total	$3,751,068	$3,712,042	$5,127,344	$5,088,318	$6,571,873	$6,532,847	$3,749,927	$3,710,901
Engineering and superintendence	187,553		256,367		328,594		187,496	
Administration, organization and legal	187,650		187,650		187,650		187,496	
Taxes during construction	50,454		56,417		80,054		50,454	
Interest during construction	334,138		450,222		573,454		334,042	
Total	$ 759,795	$ 369,641	$ 950,656	$ 560,535	$1,169,752	$ 899,788	$ 759,642	$ 369,524
Working capital	87,312	24,213	87,312	$ 24,213	87,312	24,213	87,312	24,213
Total	$4,598,175	$4,105,896	$6,165,312	$6,673,066	$7,828,937	$7,456,848	$4,596,881	$4,104,638
Cost of financing	229,909	89,075	308,266	185,504	391,447	249,030	229,844	89,075
Total physical property	$4,828,084	$4,194,971	$6,473,578	$5,858,570	$8,220,384	$7,705,878	$4,826,725	$4,193,713
Developmental costs	1,129,935	400,000	1,261,574	400,000	1,401,319	400,000	1,129,826	400,000
Total	$5,958,019	$4,594,971	$7,735,152	$6,258,570	$9,621,703	$8,105,878	$5,956,551	$4,593,713
Cost of power contract	379,542		379,542		379,542		379,542	
Grand Total	$6,337,561	$4,594,971	$8,114,694	$6,258,570	$10,001,245	$8,105,878	$6,336,093	$4,593,713

IX.

Supplemental Statement and Brief.

On October 4, 1926 the Railroad and Warehouse Commission of Minnesota made its order, effective October 15, 1926, in a proceeding in which both the Company and the City were parties, copy of which is printed herewith for the information of the Court and for such consideration as the Court deems proper.

This order was made in a proceeding pending at the time the briefs herein of the Commission and of the City were prepared and in both of the briefs the expected order is referred to and claim is advanced in both of them that the making of such an order would not render this action moot.

We agree that the making of this order does not render the question of the validity of the decree appealed from moot because of the coupons outstanding, which are referred to in the City's Brief.

We have been in doubt as to how this order and its contents should be brought to the attention of the court. It has not yet been published in the official reports of the Commission but will later appear in this publication. It has been published in the Public Utility Reports under the heading of "Re: Duluth Street Railway Co. (Minn.)," P. U. R. 1927 A, page 41. This is a recognized publication distributed among lawyers and the courts throughout the country.

We have considered whether the order and its contents should be brought to the attention of the court by the making of a formal motior under the rules to dismiss the appeal or affirm the decree below, as was done by the attorneys for the appellee in the *Prendergast* case, 262 U. S. 453, but in view of the decision of the court upon that motion we have doubted the expediency of that course.

We have thought that, in view of the character and nature of the order; the provisions for its publicity; the fact that it was made by one of the parties to this appeal in a proceeding to which all of the parties to this appeal were parties and the further fact that the making of such an order is anticipated in the briefs of both of the appellants, this Court would, under all those circumstances, take judicial notice of the order as to all of its contents.

If the court determines that it may consider this order under all the circumstances, it seems to us it removes any possible doubt as to affirming the decree appealed from for the following reasons:

1. This later order is in effect an admission by the Commission that its valuation made in the former order was too low. The former order, as pointed out in the main brief, used as a basis the values prevailing before the war and added, to give effect to increased prices prevailing at the effective date of the order, 12.99+%, while in its order of October 4th it uses as a basis of prices the average over ten years ending July 1, 1921, which were approximately 40% higher than pre-war prices.

2. The Commission found that upon a straight six-cent fare the Company would have a deficit for the year 1926 below what it was entitled to receive of $247,526.00.

3. It recognized its error in estimating the number of passengers that would be carried annually. It assumed 27,030,000 passengers would be carried annually when the actual number that was carried in the year ending July 31, 1923, was 25,384,100. The actual number carried was:

Year ending July 31, 1923	25,384,100
Year ending Dec. 31, 1923	25,014,521
Year ending Dec. 31, 1924	23,573,229
Year ending Dec. 31, 1925	25,149,212

With reference to its error in estimating the number of passengers that would be carried, the Commission said:

> "The continued increase in the use of automobiles resulting in a downward trend in street railway passengers, continues to perplex operating officials and regulatory commissions in seeking a basis for stabilizing street railway fares. The difficulties which confronted the industry and were pointed out in 1920 in the report of the Federal Electric Railways Commission to the President, and which arose largely from increase in operating costs, have been augmented by this continued increase in the use of the private automobile. In the different proceedings relative to street railway fares which have confronted us since the passage of Chapter 278, Session Laws of 1921, this Commission has from time to time been optimistic and in each case hoped that the depressing effect of the use of automobiles upon street railway operation had ended. In each instance we have been disappointed."

4. The Commission said:

> "There is no contention in this proceeding that the company is not entitled to an increase in rates,"

and then discusses the various increases suggested by the City, all of which was above six cents under the decree appealed from.

The order of the Commission allowing eight cents cash and five rides for thirty-five cents, which has been in effect since October 15, 1926, is the Commission's answer to the claim made by the City that the Commission's rate of six cents cash, five tickets for twenty-five cents, should be upheld.

The fact that the Commission in this proceeding makes no attempt to uphold its order on the merits but raises only technical objections to the jurisdiction and to the bringing of the suit before remedy under the state law had been exhausted, conclusively shows that the Commission does not consider that its order can be upheld upon the merits.

BEFORE THE RAILROAD AND WAREHOUSE COMMISSON OF THE STATE OF MINNESOTA

In the Matter of the Application of The Duluth Street Railway Company for increase in rate of fare.

On July 31st, 1925 the Duluth Street Railway Company filed its application with the Railroad and Warehouse Commission pursuant to Chapter 278, Session Laws 1921, praying that the Commission:

1. Fix and establish the fair value of the street railway property of petitioner within the City of Duluth as an operating system;

2. Fix and establish rates of fare to be charged by petitioner for carrying passengers within the City of Duluth under and in accordance with the terms of Chapter 278, Laws of Minnesota for 1921, which rates of fare shall yield to petitioner a reasonable return on the fair value of the street railway property within the City of Duluth as an operating system.

The matter came on for hearing pursuant to notice duly given, in the Cty of Duluth on June 23rd and 24th, 1926. Washburn, Bailey & Mitchell, Attorneys, of Duluth appeared for the Duluth Street Railway Company by Mr. Oscar Mitchell; Hon. John B. Richards, City Attorney, appeared for the City of Duluth.

Witnesses vere heard and evidence received. Mr. A. L. Drum, Engineer, gave testimony and presented exhibits for the Company, and Mr. H. E. McWethy, Engineer for the City. The interested parties filed briefs, report was made by the

Statistical Department of the Commission and the matter is now before us for decision.

On July 13th, 1922 this Commission entered its order on a similar application heard by us in January, 1922. Our order at that time found the value of the property of the Duluth Street Railway Company within the City of Duluth as of December 31st, 1921 to be $4,599,978.22. We fixed and established by such order a rate of fare effective August 1st, 1922, of 6 cents cash fare, five rides or tokens to be sold for 25 cents. Our order was appealed by the City of Duluth to the District Court of St. Louis County; no hearing on such appeal has been had.

The Duluth Street Railway Company immediately applied to the United States District Court for the District of Minnesota for a temporary and permanent injunction restraining the enforcement of the order, on the ground that such rate of fare as so fixed by this Commission was a deprivation of its property rights under the 14th Amendment to the Constitution of the United States. A temporary injunction was issued restraining the Commission from interfering with the collection by the company of any fare not greater than 6 cents cash per passenger, and the Court referred the matter to a master in chancery, who took evidence and made his report. On the 24th day of January, 1925, the United States District Court issued its final decree, enjoining the Commission from enforcing or attempting to enforce the schedule of rates and charges prescribed in its order of July 13th, 1922, and from interfering with the Duluth Street Railway Company charging a rate of fare for carrying passengers within the City of Duluth not exceeding 6 cents for each passenger, upon the condition, however, that until the establishment by the Railroad and Warehouse Commission of just and reasonable rates of fare for the transportation of passengers upon the streetcars in the city of Duluth, or until the further order of the Court, the company should not charge more than

6 cents for one continuous trip of each passenger upon its streetcars within the City of Duluth. (Duluth Street Railway Company vs. Minnesota Railroad and Warehouse Commission, 4 Fed (2d) 543). Separate appeals were taken from this decree by the City of Duluth and by the Attorney General of the State of Minnesota for himself and the Railroad and Warehouse Commission to the United States Supreme Court. Such appeal has not yet been heard.

Subsequent thereto and on July 31st, 1925, the application herein was filed by the Duluth Street Railway Company. The City of Duluth thereupon applied to the District Court of St. Louis County for an injunction to restrain the Railroad and Warehouse Commission from hearing and considering the petition so filed. The District Court of St. Louis County dismissed such application, and the judgment of dismissal in such court was affirmed by the Supreme Court of the State of Minnesota by its decision handed down May 14th, 1926, (City of Duluth vs. Railroad and Warehouse Commission, 209 N. W. 10). The petition of the Duluth Street Railway Company was then set down for hearing at the City of Duluth for June 23rd, 1926.

Considerable space in the briefs of the Duluth Street Railway Company and of the City of Duluth is devoted to the contention of the company that the final decree of the Federal court entered on January 24th, 1925 (4 Fed. (2d) 543) is binding upon this Commission as res adjudicata of the fair value of the company's property as of December 31st, 1921 at $5,009,510, and the reasonable rate of return thereon at 7½%. Measured by the results that we will arrive at from the evidence in this case, the point is not especially important. However, as our findings herein are not based upon any such assumption, we state that we cannot sustain the contention. Chapter 278, Session Laws 1921 imposes upon the Commission in a proceeding of this character the duty to appraise the property of the street railway company and "to fix and deter-

mine the fair value thereof" and to "fix and establish rates of fare". No such duty rests upon the Federal court. As stated by Judge Booth in his opinion upon the Company's application:

> "The proceedings before the special master and in this court are not for the purpose of fixing a rate but to determine whether the rate fixed by the Commission is confiscatory. In Pacific Gas & Electric Company vs. City and County of San Francisco, 265 U.S. 403, the court said, 'Rate making is no function of the courts. Their duty is to inquire concerning results and uphold the guarantees which inhibit the taking of private property for public use without just compensation under any guise'." (4 Fed. 2d 546).

The Federal court would have had no concern with the value fixed by this Commission had the prescribed rate of fare yielded sufficient net income to escape confiscation. Sufficient net income could have been yielded under the Commission rate of fare upon the value that was fixed by the court if the Commission had under-estimated the future net income, or had the number of revenue passengers actually exceeded the estimate of the Commission to such an extent as to yield the needed net income. In either case the Federal Court would have no cause to disturb our findings of value or grant an injunction; therefore there would be no judgment except dismissal, although the court would have undoubtedly made the same finding of value and rate of return that it did.

Judge Booth, quoting Section 9 of Chapter 278, Laws of Minnesota 1921, referred to the duty of the Commision to fix a rate of fare which would yield a reasonable return on the fair value of the street railway property, and then stated:

> "The Fourteenth Amendment to the Constitution of the United States provides a guarantee against a confis-

catory rate. The maximum and minimum are therefore fixed; within the space between if there is any such space, the action of the Commission is unassailable."

The Supreme Court of the United States in Banton vs. Belt Line Railway Corporation (45 Supreme Court Reporter 534) has, since the opinion was handed down in the District Court, stated that there is a space between what may be a reasonable rate and a non-confiscatory rate. It was there said:

"A Commission or other legislative body, in its discretion, may determine to be reasonable and just a rate that is substantially higher than one merely sufficient to justify a judicial finding in a confiscation case that it is high enough to yield a just and reasonable return on the value of the property used to perform the service covered by the rate. *The mere fact that a rate is non-confiscatory does not indicate that it must be deemed to be just and reasonable.* It is well known that rates substantially higher than the line between validity and unconstitutionality properly may be deemed to be just and reasonable, and not excessive or extortionate."

We cite this as bearing upon the point that the duty of the Federal court under the Fourteenth Amendment is concerned only with the confiscatory nature of the rate and its findings as to value and rate of return are not binding upon the regulatory commission as would be the decree of our own courts in the event of an appeal from an order of the Commission under Chapter 278, Laws 1921. (See City of Duluth vs. Railroad Commission, 209 N. W. 10).

However, the evidence in this case is without dispute that unit values of the property existing as of December 31st, 1921 have not changed to any appreciable extent. This state of the evidence in the proceeding makes it necessary to con-

sider those items of property in our former valuation to which, in the opinion of the Federal court, we failed to give proper consideration. The final figure which we found to be the fair and reasonable value of the property of the company in our former order as of December 31st, 1921 was $4,599,978.22. The court, stating that the parties were entitled to its independent judgment upon the findings and conclusions of the Commission, considered a fair rate base as shown by the evidence before the court to be $5,009,510.

The court in arriving at this figure used what it termed an "undepreciated cost of physical property items, excluding land, $3,493,405". Of this amount the court found $2,830,189 (see page 9, Exhibit 2) represented property investment installed at pre-war prices, which it determined should be increased 40%, or $1,132,075 to give effect to increased price levels, and thereby arriving at a modified undepreciated value of $4,625,480. The Commission used a figure "physical property undepreciated, excluding land, of $3,940,000". The court stated:

> "It is my opinion, therefore, based upon the evidence, and in view of the decisions of the courts, that sufficient consideration was not given to the increase in prices in the past few years."

This makes it necessary for us to further consider the value of the physical property as of July 1st, 1921.

We are not at liberty to accept the figure of $4,625,480 used by the court, for there is no evidence before us from which we could determine his base figure of $2,830,189 or from which we could adopt the judgment of the court in adding 40% thereto to account for increase in prices. We are also concerned with the future accounting of the company and the court's figures furnish no value of units of the property which could be properly distributed.

We had before us agreed figures of the city and company engineers upon the following bases:

1915 Prices	$3,488,161.00
Ten Year Average (1912-1921)	4,864,437.00
1921 Costs	6,308,966.00
Reproduction or Investment Basis	3,487,020.00

In order to give proper consideration to the increase in prices wherein the court stated we failed in arriving at the value of the physical property, we must do so from the evidence that was before us, and cannot draw from the record before the Federal court or adopt arbitrarily a percentage increase which was the court's independent judgment.

In our order fixing the value of the property of the Minneapolis Street Railway Company as of date January 1st, 1922, we stated our conclusion as follows:

> "We have reached the conclusion that unit prices for construction for the ten year period 1912 to 1921 inclusive, as applied to the inventory of physical property as of January 1st, 1922, fairly reflect the undepreciated present value of the physical property of the Minneapolis Street Railway Company, except as to rolling stock and paving."

The unit prices there adopted were compiled by the same engineer who appeared for the Duluth Street Railway Company and testified in support of the company's application herein, and which unit prices were approximately the same as those used in the ten year average for the Duluth Street Railway Company.

The unit prices adopted in our valuation of the Minneapolis Street Railway Company were also used in arriving

at the value of the St. Paul City Railway Company for its property as of date January 1st, 1924.

What we said in our orders determining the value of the Minneapolis Street Railway and the St. Paul City Railway in excepting rolling stock and paving in adopting the ten year unit prices, is applicable to the same items in the Duluth Street Railway property, as is also our statement there relative to unit prices for 1911 to 1915 reflecting the fair value of the items of rolling stock and paving, as applied to the 1915 prices for those two items of the Duluth Street Railway Company. We shall use the ten year average prices for all items of the inventory of the physical property of the Duluth Street Railway Company, except as to rolling stock and paving, in which we will use the 1915 prices in determining the fair value of the property of the Duluth Street Railway Company as of December 31st, 1921.

CONDITION PER CENT

In our order of July 13th, 1922 in making allowance for the depreciated condition of the property upon the estimated cost of the same new, we used a percent of eighty-three (83). This percent was also used by the master and by the Federal court. The engineers in the proceeding herein have testified that the condition of the property has changed little if any and is in somewhat slightly better condition than at the time of the former hearing. We shall use a condition per cent of 83 in determining the present value.

107

FAIR VALUE

We have then for the fair value of physical property (excluding land) as of July 1st, 1921:

Cost new, based upon 10 year (1912-1921) average		$4,864,437.00
Deduct (1912-1921) Paving	$ 156,907	
Rolling Stock	1,214,717	1,371,624.00
Total		$3,492,813.00
Add (1915) Paving	$ 138,472	
Rolling Stock	821,645	960,117.00
Total undepreciated value		$4,452,930.00
Less 17%		756,998.00
Depreciated Value		$3,695,932.00

This figure of $3,695,932.00 (Depreciated value of physical property as of July 1st, 1921, excluding lands and overheads) is comparable with the figure adopted by the court of $3,839,149.00.

Subsequent to July 1st, 1921, property additions and retirements have been made as follows:

Net Additions July 1, 1921 to December 31, 1921		$ 6,978.00
Gross Additions December 31, 1921 to December 31, 1925		643,457.00
		$650,435.00
Deduct 17% for depreciation		110,574.00
Present value total additions		$539,861.00

For this period July 1st, 1921 to December 31st, 1925,

the gross property retirements amounted to $208,059.00. The parties agree that these retirements should be increased to the basis of the Commission's value. To adjust the retirement original cost to the above depreciated value base, the original cost of retirements must be increased 6.22% or $13,777.00, making a total for retirements of $221,836.00.

Deducting from Present Value Total Additions	$ 539,861.00
Net Retirements	221,836.00
Net Increase in Property—Total	$ 318,025.00
Add Depreciated Value of Property July 1, 1921	3,695,932.00
Depreciated Value of Physical Property excluding Lands, December 31, 1925	$4,013,957.00

GENERAL OVERHEADS

In our order of July 13th, 1922, we determined the undepreciated value of the general overheads to be $550,000, such amount being 14% of the undepreciated value of the physical property. We depreciated the $550,000 by 17% and included the result at $456,500 for general overheads. The United States District court rejected our item for general overheads which was arrived at by applying a resulting total percentage to a base cost which was held to give insufficient recognition to increased prices, and accepted an estimate which gave *no* recognition to increased prices. Why effect should be given to increase in price of labor which enters into the physical property, and no effect given to increase in the price of engineering and superintendence (an item of general overheads) entering into the same structure, we are at a loss to understand. Having elected to build our rate base in a manner that will permit of segregation of the units from the

engineering figures before us, we shall follow through in the matter of overheads.

In the Minneapolis and St. Paul Street Railway finding of value, after an exhaustive study, we determined the percentage that each class of general overhead expense bore to the fair value base of the physical property, as follows:

(1) Engineering and Superintendence 4.5%
This percentage to be applied to the fair value base excluding Land, Expenditures not apparent in Inventory and General Stores.

(2) Administration, Organization and Legal Expense 3.0%
This percentage to be applied to the same fair value base as Engineering and Superintendence.

(3) Taxes During Construction 5%
This percentage to be applied to the same fair value base as Engineering and Superintendence.

(4) Interest During Construction 5.0%
This percentage to be applied to all property, excluding Land, but including General Stores, Expenditures not Apparent in Inventory, Engineering and Superintendence, Administration, Organization and Legal Expenses, and Taxes during Construction.

We have adopted these overhead percentages in this case and find the proper amount for General Overheads to be $495,255.00. For physical property, including overheads but excluding land, we have a value as of July 1, 1921 of $4,191,187.00, as compared with the court's finding for the same items of $4,208,683.00.

LANDS

In our former order we found the fair value of lands to be $140,000.00. The master in his report to the Federal court recommended a deduction of $7,180.00 for land made use of by the Superior portion of the system. He also allowed the sum of $31,754.00 for value of lands used by the incline railway in lieu of the sum of $46,000.00 allowed by us, making a total valuation for lands of $128,474.00. Such value was accepted by the court. We will make the deductions recommended by the master to the court and determine the value of lands at $128,474.00.

WORKING CAPITAL, MATERIAL AND SUPPLIES

There was no difference in the findings of the Commission, the recommendations of the master or the decision of the court as to the item of working capital, material and supplies, the same being $135,000.00. That figure will stand.

COST OF FINANCING

The court allowed an item of $89,075.00 for cost of financing, which was the figure recommended by the master as being an actual expenditure. The Commission had made no direct allowance for this item, stating that the same would be given consideration in the rate of return. We herein follow the direction of the court that cost of financing is an item properly included in the value of the property, and accept the court's figure of $89,075.00. It is indicated by the court that expenditures for cost of financing where shown must be allowed. In addition to the above item there has been expended the sum of $25,169.00 in financing the sale of stock author-

ized by us since our former order. We shall allow this item in addition to that fixed by the court, making a total of $114,244.00.

GOING VALUE

We allowed $500,000.00 for going value. The master and the court adopted a figure of $350,000.00. We accept this latter figure.

POWER CONTRACT

We allowed an item of $91,300 being the unamortized value of a power plant which had been dismantled by reason of the company entering into a contract for its power. This item was disallowed by the master but included by the court. The contract expires in 1931, and in accordance with the method adopted in valuing the contract in our former order, is less valuable today by reason of the expiration of the years from 1921 to 1926. We accordingly find the value of the same to be $54,780.00.

Summarizing the foregoing items of value as of December 31st, 1925, we have the following:

Physical Property, excluding Lands	$4,013,957
General Overheads	495,255
Lands	128,474
Working Capital, Materials and Supplies	135,000
Cost of Financing	114,244
Going Value	350,000
Power Contract	54,780
Total Commission's Fair Value	$5,291,710

We therefore fix, determine and find the fair value of the street railway property of the Duluth Street Railway

Company within the City of Duluth, as an operating system, as of December 31st, 1925, to be $5,291,710.00.

ANNUAL DEPRECIATION

In our order of July 13th, 1922, we made an allowance for Annual Depreciation of $115,000, stating that we adopted 2½% of the depreciable property as a basis for the figure. In the proceeding in Federal court upon that order the master allowed the same sum, with the statement that "if an allowance for depreciation is intended to restore investment, the Commission computed depreciation upon an excessive amount but in any event $115,000 is sufficient." The court in approving the master's allowance stated that "the item of annual depreciation of $115,000 cannot be considered excessive in view of the modified valuation above given." We are unable to determine whether the court approved or disapproved the master's criticism of the Commission's method of arriving at the $115,000. The master's statement evidently was made upon the theory that the Commission had applied its percentage to other than the cost value of the depreciable property. If such was the fact, the criticism was well made, as the purpose of setting up depreciation is to restore investment. While on the other hand, the statement of the court would lead to the conclusion that he was of the opinion a change in the valuation base affected the amount of the depreciation allowed. Whether either the master or the court considered that the percentage figure used was too low does not appear. We have the statement of one that the amount is "sufficient" and of the other that it "cannot be considered excessive". The testimony of the engineer of the city in the present proceeding was to the effect that "an annual charge to operating expenses at the present time of $115,000 is a reasonable and just charge."

We have referred to the testimony and the statements of

the master and court in order to set forth fully the circumstances surrounding the revision we shall make in this item of annual depreciation.

The company sets up its depreciation on a 4% sinking fund basis, and for the year 1925 charged to operating expenses for this purpose the sum of $143,357. We stated in our order of July 13th, 1922 that "it appears that the amount set aside for depreciation reserve and charged in operating expenses the past five years has on the whole been somewhat in excess of the requirements of the company". This statement still is true taken in connection with the purpose for which we make an allowance for annual depreciation chargeable to operating expenses in arriving at a rate of fare. We are not criticizing the sinking fund method used by the company which is set up on a proper basis, but the company's annual charge for depreciation to operating expenses on that basis is not a proper sum to allow as the basis for a rate order.

In our former order we stated that in the years 1917 to 1921 the balance in the reserve fund for depreciation had increased from $537,139.11 to $972,806.38. The balance in the depreciation reserve on December 31st, 1925 was $1,322,-384.95, an average annual increase from 1917 to 1925 of $87,249.00. This would seem to indicate that the company is either charging an excessive amount to operating expenses for depreciation or is failing to charge to its depreciation reserve the proper amount for retirements. Our findings and the testimony of the engineers do not indicate that the condition of the property is being allowed to depreciate through failure to replace or retire wornout units.

The original cost of the depreciable property as of December 31st, 1925 which the company uses as a basis for setting up its depreciation on the sinking fund basis is $3,531,-962.59. This is the cost of the property upon which the company is entitled to make a charge to operating expenses for

replacements. As stated by the Supreme Court of the United States in the case of Knoxville vs. Knoxville Water Company, 212 U. S. 1:

> "Before coming to the question of profit at all the company is entitled to earn a sufficient sum annually to provide not only for current repairs, but for making good the depreciation and replacing the parts of the property when they come to the end of their life. The Company is not bound to see its property gradually waste, without making provision out of earnings for its replacement. It is entitled to see that from earnings the value of the property invested is kept unimpaired, so that, at the end of any given term of years, the *original investment* remains as it was at the beginning."

The necessity of restricting the allowance for annual depreciation to an amount not exceeding that sufficient to replace the property at its "original investment" cost is forcibly illustrated by the decision of the Supreme Court of the United States in Board of Utilities Commissioners vs. N. Y. Tel. Co. (46 Sup. Ct. Rep. 363). It is there said:

> "The revenue paid by the customers for service belongs to the company. The amount, if any, remaining after paying taxes and operating expenses including the expense of depreciation is the company's compensation for the use of its property."

In the Minneapolis and St. Paul street railway proceedings we found that those companies were setting aside for annual depreciation aproximately 2½% of the book cost of depreciable property, and allowed such amount in determining the rate of fare.

In view of all the circumstances and the evidence in the

proceeding we will not restrict the allowance for annual depreciation to the mathematical 2½% on the cost of the depreciable property, but will make an allowance in operating expenses of $100,000 for annual depreciation, having in mind the claims of the company in connection with cost of motor vehicle service operated as an auxiliary to its street railway service and which will be commented upon hereafter.

COACH COMPANY CONTRACT

Included in the Company's estimated operating expenses for 1926 is an item of $12,545.63, representing the estimated operating loss of the Duluth-Superior Coach Company apportioned and charged to the Duluth Street Railway Company in accordance with the terms of certain contracts (Exhibits 7 and 8). The Duluth-Superior Coach Company is an Auto Transportation Company operating pursuant to Chapter 185, Session Laws of Minnesota, 1925 under order of this Commission dated April 17th, 1926. The coach company is owned and controlled by the Duluth-Superior Traction Company, the holding corporation of the Duluth Street Railway Company. The charge to operating expenses of $12,545.63 for 1926 is claimed under paragraph 3 of exhibit 7, being contract dated December 31st, 1925, reading as follows:

> "The Street Railway Company agrees that in the event the net earnings of the Coach Company in any one year do not equal 7½% upon the actual cash investment of The Duluth-Superior Traction Company in the capital stock of the Coach Company, as provided in paragraph 2 hereof, applicable to the automobile coaches operated by the Coach Company within the limits of the City of Duluth, the Street Railway Company will, on or before March 15th of the succeeding year, pay to the Coach Company a sum sufficient, which, when added to the net earnings of the Coach Company for the preced-

ing year, will equal 7½% upon the actual cash investment of the Duluth-Superior Traction Company in the capital stock of Duluth-Superior Coach Company, applicable to the automobile coaches operated by the Coach Company within the city limits of the City of Duluth."

The Coach Company operates motor vehicles over four different described routes, as follows:

1—Duluth-Superior route
2—Morley Heights route
3—Calvary Cemetery route
4—Fond du Lac route

With the exception of the Duluth-Superior route, all of these routes may be termed auxiliary service to the street railway, connecting with the lines of the street railway, and as to two of the same, the Morley Heights and Fond du Lac routes, transfer privileges are accorded between the vehicles of the Coach Company and the cars of the Duluth Street Railway Company.

The furnishing of service by motor vehicle in conjunction with a street railway, either by itself or through contract with a subsidiary company is not only proper but as to the three routes mentioned, required and economical. The operation of the Fond du Lac route by the Coach Company was brought about by the Duluth Street Railway Company at the instigation of this Commission. If these three routes were operated directly by the street railway company so that the proper charges for their operation appeared in the records before us, or if the contract before us determined the proper basis of the cost of the service, we would have no hesitancy in allowing the same as a proper charge to street railway operation. However, we can find no legal grounds for a charge to operating expenses of the street railway company of an amount based upon the theory of guaranteeing to the Coach

Company a specified return. Neither does the evidence enable us to determine what a proper charge should be. We are not prepared to say the claim of $12,545.63 would be excessive. We will not, however, include the item but as stated under our discussion of annual depreciation, we had this situation in mind when endeavoring to make an equitable allowance for annual depreciation.

OPERATING EXPENSE

Our analysis of operating expense discloses several necessary adjustments in order to arrive at an annual amount that might be termed normal. The adjustments occur in the accounts for removal of snow and ice, advertising, law expense and valuation expense. This latter account for 1925 includes an item of $11,415.24, being the annual sum necessary to amortize the expense under our order of July 13th, 1922 over a period of five years. This amount should be taken out and replaced with an annual allowance of $3,883.84 to amortize the estimated expense of $19,419.00 under the present proceeding, including balance not charged off under the former. We amortize the expense on a five year basis.

With these adjustments we have a normal annual operating expense and taxes of $1,282,877.00, which is fair and reasonable, summarized as follows:

Actual 1925 excluding depreciation adjusted to include additions for:		$1,041,147
Annual increase in wages	$31,581	
Removal of snow, sand and ice	1,658	
Total increase	$33,239	
Reduction in charges for:		
Advertising	$ 978	
Law expenses	2,776	
Amortization of Valuation Expense:		
Actual charges for 1925 $11,415.24		
Less annual allowance of 3,883.84		
Current allowance 2,116.16		
	5,415	
	$ 9,169	
Net Additions		24,070
Total Normal Operating Expense (Excluding Depreciation)		$1,065,217
Annual Depreciation		100,000
Total Operating Expense		$1,165,217
Taxes		117,660
Total Operating Expense and Taxes		$1,282,877

RATE OF RETURN

In our order of July 13th, 1922, in fixing and determining a rate of fare we found a rate of return of 7½% to be reasonable. This rate of return was accepted by the master in the proceedings in Federal court and found fully justified by the court. The evidence in the proceeding is conclusive that a smaller rate of return would not be justified. We accordingly find 7½% to be a reasonable rate of return in fixing and determining the rate of fare herein. In doing so we have in mind the rule as annunciated by the Supreme Court of the United States in Banton vs. Belt Line Railway Corporation

as heretofore referred to, that a just and reasonable rate may be "substantially higher than the line between validity and unconstitutionality".

REVENUE PASSENGERS

In our order of July 13th, 1922, we had before us the record of passengers carried in 1921 of 27,246,916 and the record for the first four months of 1922 showing a slight reduction. We used as an estimated number of passengers in arriving at the rate of fare, 27,030,000. The evidence in the proceeding before the Federal court showed that the actual number of passengers for the year ended July 31st, 1923, was 25,384,100. The following is a table of passengers carried for the calendar year from 1921 to 1925 inclusive:

1921	27,246,916
1922	25,572,187
1923	25,014,521
1924	23,573,229
1925	25,149,212

The company's estimate of passengers carried for 1926 with the first four months actual is 24,193,209. The actual number of passengers carried to date of this order shows the company's estimate to be approximately correct. The company's estimate for 1927 is 23,273,867. We have no data by which this estimate for 1927 can be measured.

REVENUE REQUIRED

Using the company's estimate for 1926, to-wit: 24,193,209 passengers, we find that the present fare will produce $1,465,645 gross annual income. Deducting total operating expenses

and taxes, we have a net annual income of $182,768. To produce a return of 7½% on the fair value of the property as found by us, a net income of $396,878 is required, resulting in a deficit or failure to earn the required return by $247,526, as set forth in the following tabulation:

Total Income	$1,465,645
Operating Expenses and Taxes	1,282,877
Net Income	$ 182,768
7½% Return on $5,291,710	396,878
Deficit in Net Income	$ 214,110
Add for Federal Tax 15.607% or	33,416
Making a total deficit of	$ 247,526

To produce this increase of $247,526 in revenue, an increase per passenger fare of 1.023 cents is required.

This increase necessary to produce the required revenue, would result in a cash rate of fare slightly in excess of 7 cents.

The Duluth Street Railway Company has never operated under a rate of fare where there was a differential between the cash and the token or ticket fare. For purposes of analysis of results to be obtained under such operation, we have no data available for the City of Duluth.

There has been in operation in the cities of Minneapolis and St. Paul since the first of January, 1926, under the orders of this Commission, a rate of fare with a differential existing between the cash and the token fares. The fares there in effect are 8 cents cash, 6 tokens for 40 cents. In St. Paul the relation has been for the eight months ending August 31st, 1926, 10.89% cash, and in Minneapolis, 11.29% cash.

There is no contention in this proceeding that the company is not entitled to an increase in rates. The City suggests

several combinations of fare that will produce the required revenue, assuming different rates of return based upon a valuation less than found by us and upon a number of revenue passengers in excess of what the records show will be carried for this year. The City, taking a 6½% return upon the basis assumed, finds a needed increase in fare of 14/100 of a cent per passenger. At 7% return, finds an increase of 25/100 of a cent justified; and upon a 7½% return, finds a required increase of 35/100 of a cent per passengers. We cite these figures merely for the purpose of showing that there is no evidence in this case upon which an increase in fare could be denied, and the City's figures at which it arrives at the required increase assume a valuation of more than half a million less than found by us to be fair and reasonable, and a number of revenue passengers approximately 800,000 more than will be carried in 1926.

In our orders in the proceedings relating to rates of fare of the Minneapolis and St. Paul railways, we stated as follows:

> "In determining a rate of fare which will produce the necessary revenue to constitute a reasonable return, the equities surrounding the different classes of patrons should be taken into consideration, if any there are. It is our judgment that the patrons, insofar as the revenue obligation is concerned, fall within two groups, to-wit: the regular rider, the person who resides and works in the community and for whom the service of the street cars is specifically designed and furnished; and the transient rider, the person who uses the car only on occasion. It is the support of the former group that enables the latter group to have service at their command when their convenience demands. In rates of other utilities, such as gas and electric, a service charge is imposed which compels the subscriber to contribute to the standby service whether he uses it or not. If he uses the utility to a sufficient extent, his service charge merges into his rate; if he fails to take advantage of the service, he

pays for the privilege of having the same at his command.

To give then to the regular rider the consideration which is equitably his as a wholesale buyer, and to compel the transient rider to contribute for the privilege of having at his command service when desired, there should be a difference in the fare which they contribute to produce the service. The logical solution of the problem is a cash and token or ticket fare."

The continued increase in the use of automobiles, resulting in a downward trend in street railway passengers, continues to perplex operating officials and regulatory commissions in seeking a basis for stabilizing street railway fares. The difficulties which confronted the industry and were pointed out in 1920 in the report of the Federal Electric Railways Commission to the President, and which arose largely from increase in operating costs, have been augmented by this continued increase in the use of the private automobile. In the different proceedings relative to street railway fares which have confronted us since the passage of Chapter 278, Session Laws of 1921, this Commission has from time to time been optimistic and in each case hoped that the depressing effect of the use of automobiles upon street railway operation had ended. In each instance we have been disappointed. We are basing our order in this proceeding upon the company's estimated number of revenue passengers for 1926, trusting that the estimate of the company for 1927 will prove to be under the actual for that year.

The stabilization of the cash fare at a figure which will yield the maximum revenue from cash passengers and result in the lowest possible fare to the habitual rider is, we believe, the most logical solution of the present situation.

In determining a rate of fare which will give the utmost consideration to the welfare of the car rider and also meet the requirement of law that the fare yield a reasonable return on

the fair value of the street railway property, we have endeavored to thoroughly analyze the factors involved.

If the revenue passengers for the ensuing year should not fall below the company's estimate for 1926, and the percent of cash passengers shown by the record the Twin City lines would obtain in Duluth a token fare of six for forty cents would require a cash fare of ten cents. The Commission has seriously considered this combination.

However, taking all factors into account, it is our judgment a token fare of five for thirty-five cents with a cash fare of eight cents best meets the conditions as found to exist at Duluth.

The Railroad and Warehouse Commission of the State of Minnesota therefore fixes and establishes rates of fare to be charged by the Duluth Street Railway Company for carrying passengers within the City of Duluth, Minnesota, of eight cents cash, five (5) rides to be evidenced by tickets or tokens to be sold for thirty-five (35) cents, no change in the privileges of transfer now existing to take place.

This order to be effective on and after the 15th day of October, 1926.

By the Commission,
Thos. Yapp,
Secretary.

Dated at Saint Paul, Minnesota,
this 4th day of October A. D., 1926.
(Seal)

O. P. B. JACOBSON, Commissioner, Dissenting:

I am unable to agree with the conclusion reached by the majority of the Commission that an order should be made at this time increasing the rate of fare of the Duluth Street Railway Company. The former application of this company was filed in January, 1922, and an order was entered by the Commission on July 13th, 1922, fixing the cash fare at 6 cents, with five tokens for 25 cents. Subsequent proceedings in the United States District Court culminated in a decree entered January 24th, 1925, in which the rate of fare was in effect fixed at 6 cents for all passengers. An appeal was taken therefrom to the Supreme Court of the United States, which has not yet been disposed of.

The principal reason given for an increase in fare by the majority of the Commission is that the number of passengers carried since the former order of the Commission has decreased to such an extent as to make a higher fare necessary in order to produce a return which will be reasonable. A tabulation is given in the majority decision showing the total number of passengers for each of the five years of 1921 to 1925 inclusive. Two facts disclosed by the tabulation are of special importance. The first one is that there is a wide fluctuation in the number of passengers carried year by year. Thus, the number of passengers carried in 1924 was 23,573,229, or more than 13% less than the 27,246,916 passengers carried in 1921. The other fact of importance that the tabulation discloses is that the year 1924 with the lowest number of passengers carried during the five year period, was the last complete year preceding the filing of the final decree in the United States District Court, while the ensuing year 1925 showed a total of 25,149,212 passengers carried, an increase over 1924 of 1,575,983.

The process of establishing a valuation and fixing rates for street railways in this state is a matter involving a great amount of time and labor as well as large expense. Most of it

has to be borne by the car riders. In my opinion there should be a considerable degree of stability attached to such a valuation when made. When rates are established as in this case, after proceedings both before the Commission and the courts, they should be accepted as effective until either a definite and substantial change has occurred in price levels or sufficient time has elapsed to clearly demonstrate a decided change in conditions. According to the majority opinion the undisputed evidence is to the effect that unit property values have not changed to any appreciable extent. The showing as to the number of passengers carried does not constitute in my opinion, such a definite change in conditions as to justify increasing the rate of fare at this time. It is quite apparent that there is a wide fluctuation of such numbers from year to year in the City of Duluth. Recent tendencies have not all been downward, as appears from the comparison of 1924 and 1925. Furthermore, the adjustments made in the valuation by the majority members of the Commission are based somewhat on the conclusion of the United States District Court. It may be that the valuation used as a basis for the court's decision will not be approved by the Supreme Court of the United States when the appeal is disposed of.

Therefore, it is my opinion that before any new rate should be given the street car company the Supreme Court ought to render its decision, because after the appeal is disposed of it is probable that we shall have much more definite information upon which to proceed than at present; and my view is this, that if an increase is necessary, that this Commission should take an absolutely new valuation of the company's property; and therefore I am of the opinion that no order should be made at this time changing the rate of fare in the City of Duluth, and therefore dissent from the decision of the majority of the Commission.